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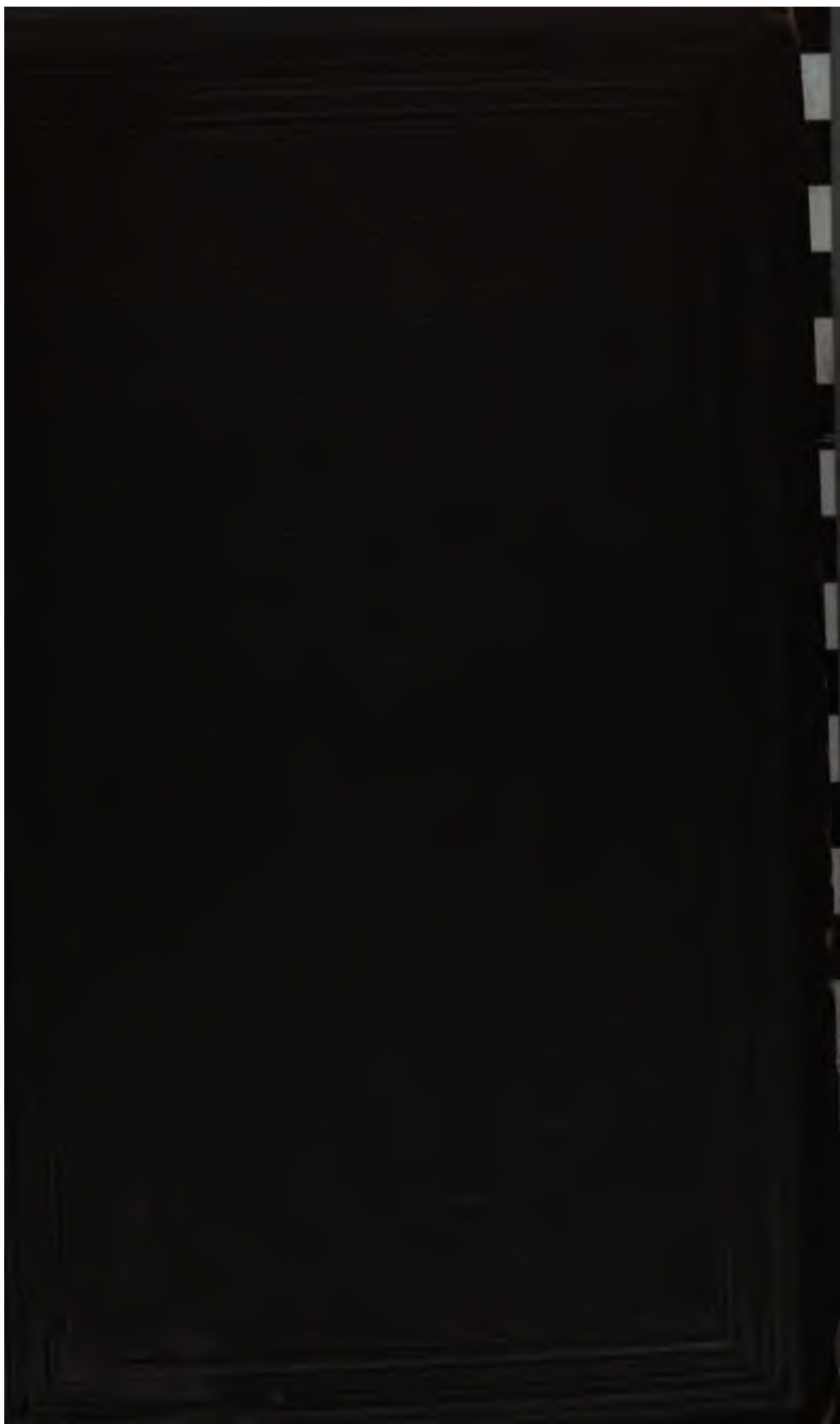
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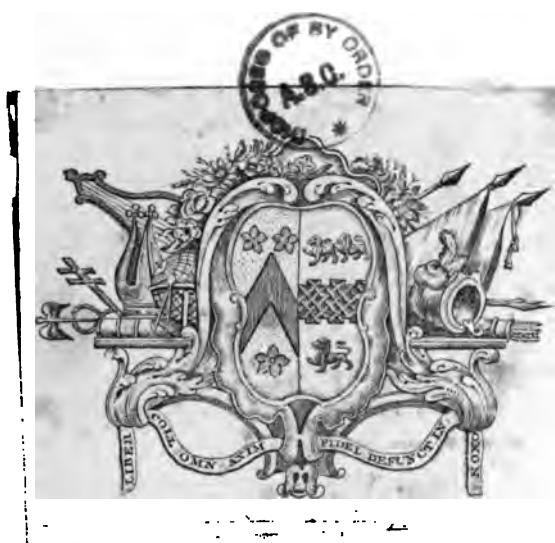
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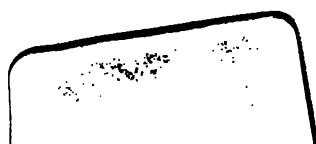
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ROMAN LAW.



ROMAN LAW.

OUVRAGES DE M. ORTOLAN.

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Explication historique des Instituts de l'empereur Justinien, avec le texte, la traduction en regard, et les explications sous chaque paragraphe, précédée de l'Histoire de la législation romaine, depuis son origine jusqu'à la législation moderne, et d'une Généralisation du Droit romain, d'après les textes anciennement connus, ou plus récemment découverts. Huitième édition, revue et augmentée, 3 vol. in-8 22 fr. 50

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THE HISTORY
OF
ROMAN LAW

FROM THE TEXT OF

ORTOLAN'S
HISTOIRE DE LA LÉGISLATION ROMAINE ET
GÉNÉRALISATION DU DROIT
(EDITION OF 1870)

TRANSLATED WITH THE AUTHOR'S PERMISSION

AND SUPPLEMENTED BY A

CHRONOMETRICAL CHART OF ROMAN HISTORY

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TRANSLATORS' INTRODUCTION.

THE superior value, as a study, of the history of the institutions and of the law of Rome to the jurist, the lawyer and the politician would appear to consist in the fact that the Roman nation presents to the modern student the most perfect and complete specimen we have of national growth, development and decay. The great influence which the Roman language, literature and institutions have had upon modern nations is, unquestionably, in itself sufficient to justify the time and research which have been spent in their study. But, apart from this, there is no period of ancient history which contains in so complete and compact a form, although extending over many centuries, a diorama of a nation's career from its cradle to its grave.

The position and progress of a nation's life may be compared to that of an individual man standing on the spot of open ground between two dark tunnels. Above and around him there shines the light of heaven, and within the limits of this contracted sphere he moves with a sense of freedom and security, but what there is before and behind him he cannot see. His destiny, however, compels him to move forward, but he shrinks from the hidden danger that may be concealed in the gloom with which his pathway is enveloped, and hesitates to take a step onward which may prove fatal. While he so hesitates a strong ray of light is cast into the tunnel behind him. As he looks steadily the light brightens, and, as it brightens, it enables him to distinguish the general features of the locality; he sees the dangers by which the path is surrounded; he also marks the safest method of avoiding those dangers. Being compelled to advance, and

having nothing to guide him but the knowledge of what there is behind, he avails himself of that knowledge and endeavours to steer his onward course by the light which has been vouchsafed him.

This gleam of light is the ray thrown by history on the past. It is the only guide a nation has in its progress through the present towards its future destiny.

It is the province, then, of the true historian to throw as clear and steady a ray as possible upon every feature of past experience. It is to collect and arrange facts and causes, and to show effects. He should, therefore, be free from political bias or predilection for personal character or particular classes. He should never be the advocate, rarely the judge. His proper functions are those of a jury—to determine the facts and to draw from them only those inferences which are conclusive and inevitable. And herein lies the immense superiority, as a study of practical utility, of ancient over modern history. The absolute impossibility of writing contemporaneous history without a bias has become proverbial. But the truth is not so universally recognized as it ought to be, that the difficulty of writing history impartially is by no means confined to the record of contemporaneous events. It applies with equal force to any history of modern times, so long as the period embraced is sufficiently near our own to involve the discussion of principles or institutions current or in existence in our own age. History, indeed, is so full of uncertainties and points of dispute that the perfectly impartial historian who would set himself to weigh each event and every public character in turn, and to place both sides of every question before his readers, in order that having the whole case before them they might form a correct conclusion, would neither satisfy himself nor his readers; for the passionless summing-up of the judge would impart so dry a character to his pages that his readers would abandon the task of mastering their contents from sheer weariness. The writer of modern history, therefore, adopts one of two alternatives.

Either he writes as an advocate—in which case his works are more like pleading than history, and, for all the lessons they profess to impart derived from the experience of the past, are practically useless—or he aims at literary effect, in which case his works savour rather of romance than history, truth being sacrificed to the artistic grouping of the picture: and they are, except so far as they may correctly represent the manners of a period, for all purposes of historical study worthless.

In dealing with ancient history, however, all the minor details have been so swept away by time, or buried beneath the lapse of ages, as to leave the sharp outline and characteristic features of the landscape unobscured. We are content to let these petty details remain in the oblivion in which we find them. To restore them would doubtless be a task of considerable interest, but it is a hopeless one; and as the great writer whose work we have in these pages undertaken to bring within the reach of the English student and the general reader has well shown, even where this reproduction has been attempted by Vico and others, imagination has so entered into the composition of the work as to detract from its utility to the student of history and jurisprudence. Piles of volumes have been written, and volumes more will probably be written, upon the character of Henry VIII. and the Reformation; but the character of Constantine the Great must remain for all time an enigma, and to attempt to determine it would be mere waste of labour. The political principles which were the active causes of events in any period of modern history are too much akin to, nay, they are in most cases so exactly the same as those which agitate men's minds in our own day, that it is scarcely in human nature to discuss their effects without bias or predilection.

To deal effectively with history, to make it what it ought to be, if the aim of the writer be higher than the production of a romance, a ray of light directing the policy of the statesman, or of a people, or informing the mind of the jurist as to the experience of the past, the writer must pass before his reader's

vision centuries of time, varieties of institutions, and that infinite diversity of elements which contribute to the development and progress of human affairs. He must depict a nation in its infancy, its growth, its manhood, and its old age. He must mark the slow or the rapid changes, the gradual or sudden modifications, and the various influences which connect the beginning with the end, and which constitute the peculiarities or characteristic features of each phase of the ever-varying scene. In order to do this he must study human nature; he must realize the material and the spiritual elements of the human being, and must be familiar with the springs and motives of human actions.

Starting with the fact that every nation or community is a collection or aggregate of individuals, he must determine wherein and to what extent that which is true concerning the individual is equally true concerning the community,—the terms upon which the individuals agree to form themselves into the community, and the fundamental principles they have laid down and recognized as the basis of their union,—their relations to each other, and their relations to external communities, and the influences which from time to time tend to alter or to modify those relations.

It is because the national career of Rome contains more of the elements which contribute to the interest and utility of historical study than that of any other nation in the world, and because of the close affinity which exists between many of the principal institutions of modern times and those of Rome, and because of its influence on our literature, and above all upon our laws, that the translators have been led to encourage the hope that the value of a work by the greatest writer on this subject, reduced to a form and clothed in language which will render it accessible to all English readers, will be duly appreciated.

M. Ortolan's *History of Roman Law*, by far the most masterly work on this interesting subject in any language, has for years been a source from which our English writers on jurisprudence have drawn much of their material. But the work

before entering on the history of the political progress of a nation, or the development of its institutions and its laws, should possess the faculty of viewing the subject objectively, by localizing it or giving it its true position in the general history of the world, and of localizing each separate event and recognizing its relations to other events. We shall therefore add a few words upon man as a free-will agent, upon government as a department or branch of the division of the labour of a community, upon law as a governing or regulating principle, and upon the proper method of treating and overcoming the difficulty of chronology.

First, then, as to man and his conduct as a free-will agent. A nation is but a collection of individuals. In some respects that which is true of the individual is true of the nation, in others the case is different. The individual is a free-will agent, but this freedom of the will is more or less controlled by circumstances. A man may be free to go from one place to another, but if he elects to go it must be *viâ* the existing track; he cannot ignore those obstacles to his straight course which circumstances over which he has no control have placed in his way. As he does not possess the power of flight he cannot take the short cut of the bird. What is true of physical obstruction is true of mental. Education has confined each man within certain channels, and taught or accustomed him to arrive at certain ends by the use of given means. Be his religion, for example, what it may, it has given him a distinct bias: and the morality of the community of which he is a member, or that of the particular knot of people with which he is immediately connected, will have its influence certainly upon every important act of his life, and perhaps also upon all those of minor and even insignificant importance. Nor is it necessary that he should be conscious of these influences; as a matter of fact, the great mass of men are not; they do or they omit to do, they pursue one course and avoid another, rarely being able to assign a reason, and certainly not the true reason. To what

been reduced one half, an act is passed making voluntary pauperism criminal. To what cause would the superficial ascribe the reduction of the cost of pauperism? To the Criminal Act, to the Education Act, or to that which produced the Education Act? If to the cause of the Education Act, what is it? In proportion as you remove the person to whom this case is submitted from the period of its occurrence, so does the difficulty of answering the question increase. The correct answer to the question is, however, the necessary key to a most important feature in the history of the English nation.

The notion of government involves the terms of compact. Is the community free, or is it not? Is it a union of human beings for the mutual benefit of the members? If so, according to the principle of the division of labour, the sovereignty is delegated by the general body to a certain section, to be exercised for the benefit of all. Is the community a compound of the conqueror and the conquered? If so, the governing spirit is oppression, the governed being regarded by their rulers as beasts of burden, whose toils minister to their comfort. Is the community a family? If so, the father, having the burden of its support, is entitled to the privilege of its direction.

In the first case it is a republic, whether the sovereignty is lodged in the hands of a hereditary monarch, an annual or biennial consul or president; or whether it is placed in those of a committee, whatever be its constitution. And assuming the sovereignty to be rightly exercised, its exercise will be beneficial and satisfactory to the body.

In the second case there is no community of sentiment or interest, and when the opportunity presents itself the organization will be destroyed by the emancipation of the servile element.

The natural duration of the third case is necessarily short, for the conditions of its existence are daily changing, and with the growth of the self-supporting faculty of the younger members their dependence decreases.

possibly, some important principle in which these words or phrases, which have come to bear a signification so far removed from their true and pure origin, are involved in the dispute, or become the weapons of the disputants. Then forthwith arises the utmost possible confusion. Theories are invented to reconcile the irreconcilable. The disputants are at war, as they fancy, about principles, whereas they are at one in principle if they could but see it, though at war about words because using them in different acceptations. And if the subject matter of dispute be one in any way connected with religious dogma or metaphysical reasoning, the discord is intensified a hundredfold.

There is no better illustration of this than the mode in which the word "morality" has been twisted from its real and original signification. The word, from *mores*, "manners" or "custom," in its strict sense signifies the recognized notions and practices of any community at a given time, and used in any other sense it is apt to lead to all sorts of perplexities and many irreconcilable conclusions, and not unfrequently to give birth to great injustice and confusion between truth and error. In this sense of the word it must be clear that morality is purely relative. The habit of separate individuals or communities erecting a standard of right and wrong of their own, and measuring the acts and motives of other men by that standard, is universal. Hence men are ever prone to set up a standard of right and wrong in accordance with the views, opinions, feelings and practices prevalent in their own time, losing sight of the fact that such views, opinions, feelings and practices may vary and do vary under different conditions and in different stages of civilization, in different communities and in the same community at different times, whereas that which is in itself good or bad is fixed and immutable. The one is the law of morality, the other the law of God. Many cases of the confusion which has arisen from the want of observing this distinction will readily occur to the mind. Take, for instance, the institutions of marriage and of slavery, and the practice of duelling. It is

immoral for the Englishman to have more than one wife; it is perfectly moral for the Turk to have several. Less than a hundred years ago duelling was both legal and moral in England; at the present moment it is illegal, immoral and universally reprobated. So, again, slavery at the commencement of this century, at least so far as the coloured races were concerned, was an existing institution, the propriety of which was rarely questioned. At the present moment there is scarcely a civilized nation which does not loathe it as an infamous practice. Yet men, always anxious to judge others by their own standard, and losing sight altogether of the essential principle of the law of morality, have endeavoured to persuade themselves and others that morality is that which is good in the abstract; and hence we have witnessed the absurdities into which men have been led by assuming that the law of morality is synonymous with the law of God, and going about to justify such practices for instance as duelling, or such institutions as slavery, by reference to the Bible; and we have lived to see arguments in favour of polygamy drawn from the example and practice of the Jewish nation. And this principle, or rather this confounding of principles, has been carried so far as to invade the province of Divine law. The expression so commonly used by schoolmen, "the moral government of God," in reality can signify nothing else than the economy of the Divine government, measured, shaped and squared so as to fit in with human notions of what ought and ought not to be the principle of that government.

What, then, can be more illogical or more absurd than to affix the stigma of immorality upon practices and institutions prevailing among different communities, or among the same communities at different eras in their history? Or, in other words, what error can be more fatal to a true appreciation of the real principles and facts of history, and the lessons they are calculated to teach, than for the historian to judge or to measure the past by the standard of the present. Institutions have lived

and died out, laws have been made and repealed, practices allowed to prevail and become obsolete, which, at the time they flourished, were considered as necessary for the well-being of the community as they would at another time be considered pernicious and reprehensible. A nation, like an individual, has various stages of development, and though the treatment suited to the child is ill adapted to manhood, the man is none the less indebted to the discipline of his youth, nor can he in his decline venture with impunity to use the strong diet and violent exercise of his vigorous manhood.

In order to judge of men, of institutions, of laws and of practices, we must identify them with their period ; and in order to identify them with their period, we require before the eye an objective chronology. Dates are worthless unless they convey to the mind positions relatively to a whole, of which the particular date is a fraction. The entire period under discussion must be present to the mind before it is possible to realize the bearing or value of a date, or the circumstance that characterizes it. A similar fact is realized by all in connection with the study of geography. We seldom think of describing the relative positions of places by stating their respective degrees of latitude and longitude, and even when we do so, the notion conveyed entirely depends upon the fact of a map being present to the mind's eye. We have all seen, and more or less perfectly remember, the form and general features of the map of England, though no map is actually before us. When the word Newcastle is mentioned, we at once look as it were to the top or north ; on the mention of Cornwall, to the south-west ; on that of Kent, to the south-east ; and though not knowing a given place, when told that it is so many miles north-east of York for instance, with the locality of which we are acquainted, we at once realize its position, and consequently many facts connected with it. This is not the case with history when studied in the ordinary manner, though if possible this power of localization in connection with history is of

date. It supposes that, up to that time, laws have been enacted in a fragmentary form, and that, as a result of their disjointed character, the legislation of the country is needlessly cumbrous and inaccessible. The most important matter, therefore, to consider, in connection with codification, is the means by which a code may be prevented from becoming an obstacle to progress. To a certain extent, English legislation has shown us, though most imperfectly, how this may be accomplished. At the present moment our legislature is in the habit, as circumstances may require, of issuing acts of parliament. These are, in fact, means of amending, abrogating or supplementing existing law. The great defect of the present system is that, instead of withdrawing, upon each occasion when alteration is found necessary, the existing law upon any given subject, for instance bankruptcy, and issuing a new amended and a complete code upon the subject, that which exists is allowed to remain; generally, however, it is mutilated, and a new act is promulgated introducing certain changes. The result is that, in order to ascertain the actual law upon the point under consideration, it is necessary to refer to a variety of acts, and much unnecessary labour and expense and the risk of uncertainty and inaccuracy is the consequence. All these difficulties might be obviated and the obscurity removed if, whenever any alteration was required in a portion of a statute, the whole statute was repealed and a new act introduced, reproducing those portions which required no amendment and containing the modified or the new clauses in their proper place.

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Were this system pursued in respect to our legislation the necessity of a general code would not exist, and alterations in the law could be made with facility and with little attendant expense either to the legislature or to those whose business it is to be familiar with the law. These remarks do not, of course, apply to the codification of what is known as judge-made law, at least to the extent that this branch of law has not, up to the present time, been codified in our country. This neglect has

Viewed in this light, it is difficult to understand what the real notion is that is entertained by those who advocate this fusion. If it is to give jurisdiction to all courts alike concerning all matters, this must necessarily result in one of two things: the compelling judges and the profession to become familiar with all branches of the law, which is admitted to be, as the law now stands, an impossibility, or in the simplification and codification of all law as a step precedent to such fusion.

The translators have had the usual difficulty to contend against which attends every effort to give expression to the thoughts and ideas of a great scholar and profound thinker in a language foreign to that in which those ideas were first thought out and clothed with words. It is obvious that the same latitude which is allowed to the translator of a purely imaginative writer, a novelist or a poet, is scarcely permissible in the case of a work upon law and jurisprudence. They have endeavoured, therefore, to adhere as closely as possible to the original consistent with the idiom of the English language. A copious Index will increase the value of the work to the student of Roman history and literature, by affording easy reference to the explanation of technical phrases and terms which are so constantly met with in the works of Cicero, Tacitus, Livy, and the other Latin text-books. While the course of general history, briefly stated and logically arranged, will, with the assistance of the chart, be impressed with facility on the memory.

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ABBREVIATIONS.



Gai. ii. 22	<i>For</i>	Gaius's Institutes, commentary second, paragraph twenty-second.
Ulp. xxiv. 26	„	Ulpian, title twenty-four, paragraph twenty-six.
Ulp. Inst.	„	Fragments of the Institutes of Ulpian.
Paul. Sent. iii. 3, 17 ..	„	Pauli Sententiæ, third book, third title, paragraph seventeen.
Paul. Frag.	„	Fragment on Fiscal Law ascribed to Paulus.
Cod. Theod. viii. 12, 8, § 1.	„	Theodosian Code, eighth book, title twelve, section eight, paragraph one.
Vatic. J. R. Frag. § 7	„	Fragment of Roman Law discovered by M. Mai in the Library of the Vatican, paragraph seven.
LL. Mos. et Rom. Coll. xvi. 4.	„	Comparison between the Law of Moses and the Roman Law, title sixteen, paragraph four.
Dig. xxxviii. 7, 2, § 1, f. Ulp.	„	Digest, book thirty-eight, title seven, section two, paragraph one, fragment of Ulpian.
Cod.	„	Justinian's Code.
Inst.	„	Justinian's Institutes.
Theo.	„	Paraphrase of the Institutes by Theophilus.

ERRATA.

Page 59, line 17, for "*censitaires*" read "*censitarii*."

Page 98, line 10, for "B.C. 454" read "B.C. 451."

Page 98, last line, for "B.C. 452" read "B.C. 449."

Page 202, line 19, for "*mancipia*" read "*municipia*."

Page 223, line 1, for "*administratio*" read "*demonstratio*."

Page 248, line 26, for "*repentino*" read "*repentina*."

Page 377, line 23, for "Maximin" read "Maximian."

Page 459, note ², for "de Justiniani" read "Justiniani."

Page 496, in heading, for "UNDER JUSTINIAN" read "AFTER JUSTINIAN."

Page 642, line 16, for "*εἰς*, written," read "*εἰς*, with."

INTRODUCTION.

EVERY historian ought to be a jurist, every jurist a historian. It is impossible to understand an enactment without a thorough acquaintance with its history. But then the question occurs, **what is this history?** Does it consist in dry tables of laws arranged in chronological order? Certainly not. The manners of a nation, its movements, its wars, its growth, its civilization, are each of them causes that mould the national law. It is our task to investigate these causes, indicate their influence, and trace the changes they have brought about. Most writers have made the history of law subordinate to that of the people, and have been content to trace their progress, independently of the development of law, to an epoch when their system of jurisprudence underwent some striking modification. I prefer, however, an opposite course, and consider that the history of the people should be subordinate to that of their law. As landmarks in the progress of a nation, I select great political events which modify the national character by changing the government. In these revolutions public law is remodelled, and if in some cases the legal system no less than the national character appears to remain unchanged, we must take care not to be deceived by an outward semblance of conformity, for we shall find that in all such cases the seed has been sown which sooner or later will bear the fruit of change.

Adopting, then, this system in treating of Roman law, we shall have in this summary to consider the subject in three divisions, corresponding to three epochs—That of the Kings, that of the Republic, and that of the Empire.¹

¹ The divisions ordinarily adopted in books upon the history of law will be found in the Appendix.

FIRST EPOCH.

THE KINGS.

SECTION I.—ORIGIN OF ROME.

2. THE infancy of all ancient nations is wrapt in obscurity their earliest history is clouded by a mass of doubtful tradition and incredible fables. This remark is especially applicable to the Romans, whose origin, though not of great antiquity, was veiled even from their own eyes. Popular stories, heroic ballads, the Pontifical annals, containing the records of prodigies and supernatural events, formed the basis of their history, which were supplemented by a species of tradition adopted by poets, historians, publicists and jurists, vaguely at first, but gathering assurance by repetition till it came to be regarded as a historical record. This is the national belief, and is to be traced in every branch of Roman literature.

3. The critic and the sceptic of modern times, however, have ruthlessly assailed these traditions of Roman origin, and it has become the fashion to rank them with the fables of mythology, not only as to that portion of the narrative which is manifestly fable, but also to much which has the semblance of truth.

4. These efforts have not been solely iconoclastic. Criticism has attempted to reconstruct. It has endeavoured to resuscitate from its decay the Rome of early times, whose origin was a mystery even to its own people. Love of popularity, the eagerness of theorists, not unfrequently the fertility of imagination have given birth to rash conjectures, which, in addition to the

charm of novelty, possessed sufficient fascination to secure for a time popular favour.

These efforts were not confined to modern times; for speculations on this subject commenced with the revival of literature in the sixteenth century. In a work written in 1685, Perizonius traces the basis of early Roman history to old popular ballads and funereal songs. And Cato, in his treatise "Origines," alludes to the odes which used to be sung long before his time on festive occasions in the houses of men of rank, in praise of the heroes from whom they claimed descent. Cicero also alludes to these odes with a regret that they had become obsolete.¹ Perizonius warns the student against reliance upon these poetical effusions, which had their origin in vanity and the love of the marvellous.²

Thus it must be borne in mind that the mythical character of early Roman history, although it has been brought prominently into notice by the careful research of modern times, was not a new idea; and, without alluding specially to several minor efforts in this direction to be found in the "Transactions of the *Académie des Belles Lettres*," Dr. Beaufort, in 1738, published a dissertation on the uncertainty of the five first periods of Roman history.³ And some years previously Vico, at Naples, whose footsteps Niebuhr in our own time has to a certain extent followed, undertook the reconstruction of this doubtful epoch upon more independent data, derived from the great principles of the Philosophy of History.⁴

5. But these researches have been carried still further back into the vista of time, and attempts have even been made to

¹ Cicero, *In Brutum*, § 19: "Atque utinam exstarent illa carmina, quæ multis sæculis ante suam ætatem in epulis esse cantitata a singulis convivis de clarorum virorum laudibus, in *Origines* scriptum reliquit Cato!"

² Perizonius, *Animadvers. historica*, ch. 5 et 6, Amsterd., 1685.

³ Utrecht, 1738. Also, by the same author, "La République romaine," La Haye, 1766. 2 vols. in 4to.

⁴ Vico, amongst his early Latin works, in his "De uno universi juris

principio et fine uno" (1720); "De constantia jurisprudentiæ," in two parts; "De constantia philosophiæ et De constantia philologiæ" (1721); but especially in his "Scienza nuova" (1st edit. 1725; 2nd and 3rd edit. 1730, 1744). Niebuhr, "Histoire romaine" (first volumes printed 1811 and 1812, recast in subsequent editions); French translation by M. de Golbéry (six vols. 8vo., 1830 to 1837). Niebuhr died January 2nd, 1831, before the completion of his great work.

trace the progress of civilization in ages anterior to the birth of Rome, by rekindling to life the ashes of Italian nationalities long concealed beneath the ruins of the colossal city, by reproducing Italy as she existed prior to its foundation with all her inhabitants, their diverse states, their institutions, their languages long buried in the past. The labours of Lanzi have demonstrated the possibility of deciphering with tolerable accuracy the writing, and not unfrequently the language of this ancient people, by a study of their monuments. And we are indebted to Micali for some interesting essays upon the main features of their general history. These are pleasing speculations, which, could the limits of my work admit of it, should undoubtedly find a place here.

6. There was in the poetry and literature of Greece, as also in that of Rome, its offspring, a tendency to ascribe a Grecian character to the origin of the Italian States. This is shown in the three grand epic events of Grecian poetry, the return of Hercules from his Iberian expedition, when he opened the road to the ocean, placing restrictions upon its use; the voyage of the Argonauts, in which Hercules himself assisted at the outset, and the dispersion of the Grecian or Trojan heroes after the fall of Troy, with the wanderings of Ulysses and Æneas. The genius of the poet has, in all these popular legends, attributed to the Greeks the capture and possession of Italian soil. Add to these that other obscure legend of the Pelasgi, whom Homer calls "a race divine,"¹ but who might have been called, according to Myrsilus of Lesbos, by a play upon the word which the wit of the ancients could appreciate, Pelargi, that is to say, a "race of storks."² To them the Dodonian oracle might have said, "Go seek the sea-girt land of the Sicilians consecrated by its inhabitants to Saturn and the Cotylæus."³

This influence of Grecian mythology and literature upon that of Rome caused the Romans to overlook the study of the ancient population of Italy, their real ancestors; and hence the exploits, the customs, institutions and languages of the

¹ Od. lib. xix. 177.

² Dion. lib. i. § 28.

³ Ibid. § 19. Macrobius, *Satur-*
nalia, lib. i. c. 7.

people from whom the founders of Rome were descended, have been, if not altogether forgotten, at any rate obscured. And the share which the aboriginal races took in developing the civilization of Italy has been overshadowed by the influence which the Greek colonies, located on different parts of the Italian shores, contributed to that result. This influence, too, has caused the primitive appellation of a part of these shores to be merged in the name of *Magna Græcia*, and this to such an extent as to make it appear that Italy owes its civilization to that country alone.

It is however still possible to trace in these Roman writers vestiges which we may recognize as those of the ancient Italians. Medals, coins, funereal monuments with inscriptions, and written monuments of still greater value, a variety of works of art and industry consecrated to domestic or public use, or to religious rites, together with the remains of walls still subsisting, the magnitude and solidity of which have given them the name of *Cyclopæan*; in one word, all the treasures of archæological research are at hand to aid us in this attempt at historical restoration. Micali, whose works have been already cited, has made this attempt; it is true with a certain amount of national prejudice, but with ability that claims attention and asserts authority.

7. We shall mislead ourselves and others, if we seek in any other direction for the bases of the history of Roman law. And with due regard to the eminent services rendered by Niebuhr in the details of Roman history, he has laid himself open to censure for the influence he has attributed to Grecian, in comparison with Italian genius, throughout the whole course of his study of Roman institutions. The old popular ballads, which purport to relate the story of the foundation of Rome and which were in existence even in the time of Cato, were at least adapted to the condition of the language of his period. And the popular ballads, descriptive of the earliest times of Rome, were of Italian character and not imported from without. Of the same type were those religious institutions, belief and practices among the Romans, derived from antiquity, which influenced their life,

both public and private. It would be an error to look upon these institutions and customs as created and improvised for the first time by the Romans. Rome, at first, was nothing more than a nucleus where the principle of agglomeration, so characteristic of the Italians, had been developed, and it resembled many other similar centres of association formed by the numerous minute sections into which the inhabitants were subdivided. In some cases, however, the principle of confederation among the different towns and colonies resulted in the acquisition of increased power and more extended territorial limits. The religious rites, the magisterial office, the costumes or external insignia, the fasces, the axes, the lictors, the curule chairs, are all of Italian origin.¹ If Greece was able to introduce into the religion of Italy the greater part of its deities, Italy, on the other hand, derived from sources more remote its national divinities not unfrequently borrowed in its turn by Greece, such as Janus and his companion Camese symbols of the land of birth, Vesta the goddess of the sacred fire, Faunus and many others whose names are less commonly known, not to mention the Camænian nymphs invoked by the poets in the Augustan age. Varro also, in speaking of the altars consecrated by King Tatius to Rome, tells us that they have Sabine characteristics.² And, as regards language, if Greece has added much to the Roman vocabulary as it has descended to us, the primitive roots of the language are undoubtedly of Italian source—roots deeply set in the very elements of Italian speech and which have been too much overlooked by the grammarians of the later time of the republic and the empire, but which nevertheless indicate their origin.

In fact, Rome following the usage of other Italian towns, had its protecting deity and its sacred name of Latin derivation.

¹ Macrobius, *Saturnalia*, lib. i. ch. 6: "Tullus Hostilius, Hosti filius, rex Romanorum tertius, debellatis Etruscis, sellam curulem lictoresque et togam pictam atque prætextam, quæ insignia magistratuum Etruscorum erant, primus ut Romæ haberentur, instituit." See also Livy, lib. i. § 8; and Silius, in his poem on the Punic wars (ode 8, line 485 et seq.), referring

to Vetulonia, one of the principal Etruscan towns:—

Bisenos hæc prima dedit præcedere fasces,
Et junxit totidem tacto terrore securæ;
Hæc altas eboris decoravit honore curules,
Et princeps Tyrio vestem prætexuit ostro.

² Varro, *De lingua latina*, lib. iv. § 74: "Et aræ Sabinam linguam olent quæ Tati regis voto sunt Romæ dedicatæ."

soil, indigenous and aboriginal, we adopt the principle usually accepted as a guide in kindred speculations, and rise to the grand conception of a common origin! If we search for an answer to the question, whence came these numberless petty states, or whence did the Italian peninsula, or Greece, or Spain, or Gaul, or other parts of Europe, receive their population? we find ourselves passing away from the study of minute details, and petty subdivisions confusing us with numberless anomalies and intricacies in race and language, and coming within view of the fountain head, we obtain a glimpse of a unity of origin among the races which peopled Europe, races that are detached branches of one common stock, sprung from the same distant lineage: and we may cease to wonder at the event which happened at the battle of Marius against the Ambro-Teutons, when from the ranks of the army of the barbarians as well as from those of the Italian auxiliaries there burst forth, to the great astonishment of the combatants, the same war cry, "Ambra, Ambra!"¹

And with these dim and uncertain vestiges before us of a forgotten unity, which are to be met with everywhere amid the utmost diversity of human language, we begin to perceive the basis of a common origin of race.

We are indebted to M. Ampère for the commencement of a history of Rome,² written at Rome itself, from the testimony of archæological remains. These materials have been arranged and elaborated with much genius and taste, aided by a skilful application of the inventive faculty. In order to write his history, this accomplished scholar and poet ascended successively every summit of the locality whence he might obtain a survey of the surrounding district. But we may ask whether, in thus localizing the point of vision, an author does not run a risk of restricting too much his field of observation? In order to investigate fairly the history of the distribution of mankind in connection with the corresponding subdivisions of territory, should not the philosopher rather ascend to the summit of Mount Ararat, and thence endeavour to trace the course of those streams of the great human family which the vast Asiatic

¹ Plutarque, *Vie de Marius*.

² Paris, 1862. Two vols. in 8vo.

cradle of our race has, amid the dim and uncertain haze of past ages, successively sent forth to people the continent of Europe?

Feeble as the glimpse may be which we get of the progress of different tribes towards the west, the comparative study of fragmentary traditions, customs and national beliefs, aided by the light which modern researches in philology have thrown upon the subject, enables us to arrive with certainty at some grand results. We are in a position to assert, that certain powerful races belonging to the Japhetic family, the Iberians, the still more powerful and extended race of Kelts (Gaëls), and their kindred race, the Cimbri, have given to the Italian peninsula, as well as to Spain and Gaul, and other parts of Europe, their population. So that, although these countries were peopled at different times by races who immigrated into them in different proportions by separate routes, and by successive invasions or immigrations, they are inhabited by men originally of the same race. The Ligüres, the Sicüli and the Sicani are, according to the most commonly received opinion, branches from the same Iberian stock. The Umbrians, according to traditions to which the learned Roman was not a stranger, were regarded as the progenitors of the Kelts or Gaëls who had crossed the mountains into Upper Italy.¹

The mysterious Pelasgi were but tribes of Cimbri, who, emanating from Thrace, spread themselves over certain parts of Asia Minor and the Grecian Archipelago, and reached even the almost sea-girt land of Italy. The fact of their being established in Greece led to the belief in their Hellenic origin, notwithstanding that they preceded by a long time the races who at a later period replaced them, and even borrowed from them the appellation of Greeks and Hellenes. From the same stock of Cimbri sprung the Etruscans or Tyrrhenians (although to trace their derivation from the common stem we must look further back), who were offshoots of another branch of the

¹ "Sane Umbros Gallorum veterum propaginem esse M. Antonius refert" (Cervius, ch. 12, *Æncid.*). This M. Antonius Guipho was a preceptor of Julius Cæsar, and came from Cisalpine Gaul. "Bochus absolvit Gallorum veterum propaginem Umbros esse" (Solin,

De memorabilibus mundi, ch. 8). This Cornelius Bochus was enfranchised by Sylla, and renowned for his erudition. "Umbri Italiæ gens est, sed Gallorum veterum propago" (Isidore de Séville, *Des origines*, lib. ix. c. 2).

Pelasgi, and at a subsequent period made their way to Italy.¹

Lastly, a third race also sprung from the "Asiatic cradle," and, tracing its lineage to the source personified under the name of Japhet, must be reckoned among the ancestors of the Italian nation. This is the Ionic race, whose descendants, in after ages and in another land, threw such lustre on the Pelasgic names of Greek and Hellenes.² This race, at its first appearance in Europe, settled some offshoots on the coast of Sicily and Italy, and with difficulty established itself in Greece by expelling or intermingling with the Pelasgi, and at that time gave no promise of the renown that was destined in after ages to be attained by its descendants.

Care must be taken not to confound with this primitive Ionian element in Italy the colonies which the Greeks, at a much later period and in the height of their prosperity, founded in that country, and from which the name of Magna Græcia came to be given to a portion of the Italian shores.

Of these events, whose history is traced with difficulty amid the obscurity that overhangs the origin of the human race, the most recent dates back as far as fifteen or sixteen centuries prior to our era, and seven or eight hundred years before the foundation of Rome. In effect, they show that there were three principal races by which Italy was peopled, the Iberians, the Kelts or Gaëls, with their kindred Cimbri, and the Iones. And the early population of Gaul had without doubt a similar origin. From these sources emanated the ancient races now known as the aboriginal inhabitants of Italy, not in a single stream pure and unmixed, but in many different channels, sometimes uniting, sometimes crossing each other, according as the accidents of locality and surrounding circumstances affected their course. Amongst some of these, as was the case with the Ligures and the Siculi, with the Ausones and their offshoots, the Volsci or Opici, with the Umbrians and their numerous

¹ "Hyginus dixit, Pelasgos esse qui Tyrrheni sunt: hoc etiam Varro commemorat" (Servius, c. 8, *Æneid.*). See the concise but instructive work by M. Bergmann, of Strasburg, *Les peu-*

ples primitifs de la race de Jafète: Colmar, 1853, p. 42 et seq.

² Vide the same work by M. Bergmann, p. 54 et seq.

colonies, with the Sabines and their branches, with the Piceni and the various Sabellic tribes, with the Marsi, the Hernici and the Etruscans, the race of the Iberians, or Gaëls or Cimbri, acquired preeminence, whereas among others, as in certain parts of Latium and of the Italian or Sicilian coasts, the Iones were in the ascendant.

But as we approach the period when the history of Rome commences, we find that all connection with the past and all traces of unity of origin had been forgotten. At the present day we should regard the internal affairs of petty communities, mere fragments and infinitesimal sections of a population, however important they might appear in their own annals, as matters of very little significance. Doubtless these petty states had their own history—their growth, their divisions, their international wars, their politics, coloured by the accidents of the time and local influences—but the end of all of them was Rome, and they were absorbed in a destiny which was fated to embrace the world.

Notwithstanding, however, the great extent to which the principle of dispersion had been carried out, there are many indications to be observed of the existence on a larger scale of previous nationalities which had gone through a course of prosperity and subsequent decline; such, for instance, as affinities in language and custom, symptoms of unity in their systems of confederation and colonization, political alliances and co-operations in military ventures. But among the subordinate nationalities which existed up to the time of Rome, and were taken up and finally absorbed by her, three, viz., the Latins, the Sabines and the Etruscans, occupy a prominent position. In fact, it was in the midst of these, and by the union of detached sections from each of them, that the new political organization was formed. And in whatever proportions this combination was effected, there is no doubt that it was the basis upon which Rome was founded.

The Latin element had the double advantage of territory and antiquity, the Sabine that of power and independence, the Etruscan that of civilization and religious and political institutions already established and defined.

9. The method by which the union between a certain section of the Sabines and the Romans was effected is related in detail by tradition, and is celebrated in the national poems. The appellation "Quirites" was the sacred name of these Sabines, and was derived according to Festus from the goddess Ceres, to whom they offered the sacrifice of water and wine, whence also Cures the name of their chief city, and Curis or Quiris the Sabine lance, the emblem and instrument of power.¹ The Quirinal Hill was so styled, according to Varro, because it was upon its summit that the Sabines encamped when they came with Tatius from Cures to Rome.² The twofold origin of the Romans is also indicated in their sacrifices, their prayers and their religious formulæ. And the phrase "Populo Romano Quiritibusque"—subsequently altered to "Populus Romanus Quiritium"—would seem to indicate that it was the custom at one time to invoke the gods on behalf both of the Romans and the Quirites.³ Moreover, it was from the Sabines that the Romans themselves took the name of Quirites,⁴ and Romulus was called by the sacred name Quirinus.⁵ Thence also came their goddess Cures and the god Quirinus, the deity of the lance, identified with Romulus and to whose honour a temple was erected on the Quirinal mount.⁶ This lance long continued to play an

¹ Festus, on the word *Quirites*: "Quirites, dicti Sabini a Curi dea, cui aqua et vino sacra facere soliti erant. . . Ab ejusdem autem deæ nomine videntur item *cures* Sabine hæstæ appellatæ, quibus ea gens armis erat potens."

² Varro, *De lingua latina*, lib. v. § 51: "Collis *Quirinalis*, ob Quirini faunum; sunt qui a Quiritibus, qui cum Tatio Curibus venerunt Romam, quod ibi habuerint castra." See also Festus, on the term *Quirinalis collis*.

³ Festus, on the word *Dici*: "Dici mos erat Romanis in omnibus sacrificiis precibusque, POPULO ROMANO QUIRITIBUSQUE, quod est Curensibus, quæ civitas Sabinorum potentissima fuit." See this religious formula altered in Aulus Gellius, lib. x. cap. 24, a formula of the Prætor announcing the fêtes called Compitalia for the Roman people, Quirites; and Livy, lib. viii. cap. 9, a formula by which the Consul Decius devoted himself on behalf of the Roman

people, Quirites.

⁴ Livy, lib. i. § 13: "Ita geminata urbe, ut Sabinis tamen aliquid daretur, Quirites a Curibus appellati."

⁵ Ovid, *Fasti*, lib. ii. line 477 et seq., where the three grounds are given upon either of which Romulus may have been called *Quirinus*:—

Sive quod hasta *curis* prisclis est dicta Sabinis,
Bellicus a telo venit in astra Deus;
Sive suum regi nomen posuere Quirites;
Seu quia Romanis junxerat ille Cures.

Festus, on the word *Quirinus*: "Quirinus ex hac causa Romulus est appellatus, quod curi, id est hasta, uteretur, a qua Romani eo nomine Romulum appellaverunt."

⁶ Ovid, *Fasti*, lib. ii. line 511:—

Templa Deo fiunt, collis quoque dictus ab illa.

It was the latter of these two which gave to the mountain its name Quirinal, on account of the temple there erected to Quirinus.

important part in their symbolic ceremonies, their formulæ and the technical language of Roman Law.

10. The Etruscan element is less clearly traced in popular tradition; but its existence can be satisfactorily established from the testimony of the historians, supplementing that of tradition. Varro, Festus, Tacitus and Dionysius of Halicarnassus tell us that Mons Cælius was so named from one Cælius or Vibenna Cæles, a noble Etruscan, who had come with his retinue (*cum suâ manu*) to the succour some say of Romulus, others of Tarquinius Priscus, and established his residence upon this hill, which in after times their descendants were required to abandon, when they were forced to take up their residence in the plain country, because the position upon the heights when fortified gave them an advantage and enabled them to domineer over and disturb at will the surrounding territory. Antiquarians are not agreed as to the name of their king, but this much is certain, that they formed in the plains, not far from the Forum, a settlement which received from them the name of the Etruscan Quarter (*Vicus Tuscus*), where was to be seen the statue of Vertumnus, the principal deity of Etruria. The Mons Cælius was, before the arrival of the Etruscans, called Querquetulanus on account of its being thickly covered with oak trees. And in like manner Mons Quirinalis was called, before the arrival of the Sabines, Agonius or Ægonus.¹

¹ Varro, *De lingua latina*, lib. v. § 46: "Cælius mons, a Cælio Vibenno, Tusco duce nobili, qui cum sua manu dicitur Romulo venisse auxilio contra Tatium regem: hinc post Cælii mortem, quod nimis munita loca tenerent neque sine suspitione essent, deducti dicuntur in planum. Ab eis dictus vicus Tuscus, et ideo ibi Vortumnus stare, quod is Deus Etruriæ princeps." Festus, on the word *Cælius*: "Cælius mons dictus est a Cæle quodam ex Etruria qui Romulo auxilium adversus Sabinos præbuit, eo quod in eo domicilium habuit." Dion. Halic., lib. ii. § 38. Tacitus, *Annales*, lib. iv. § 45: " . . . Montem eum antiquitus Querquetulanum cognomento fuisse, quod talis silvæ frequens fecundusque

erat; mox Cælium appellatum a Cæle Vibenna, qui dux gentis Etrusce, quum auxilium appellatum ductavisset, sedem eam acceperat a Tarquinio Prisco, seu quis alius regum dedit: nam scriptores in eo dissentiunt; cætera non ambigua sunt, magnas eas copias per plana etiam ac foro propinqua habitasse, unde Tuscum vicum e vocabulo advenarum dictum." The version current among the Etruscan writers was somewhat different. According to them it was Servius Tullius, the faithful companion of Cæles Vibenna, who, after his reverse, quitted Etruria with the wreck of his army and occupied the mount, which he called Cælius in honour of his chief. He also changed his own Etruscan name from Mastarna to Servius Tullius. We de-

The existence of the Etruscan element also appears, though somewhat obscurely, in the account given us of the Luceres, the third section of the Roman people (*pars tertia populi Romani*), which was constituted a tribe (*distributa*) by Tatius, or, according to Festus, by Romulus.¹ The origin of the name Luceres was explained by the Romans in different ways: Livy tells us that it was uncertain;² Festus derives it, in the passage just cited, from a certain Lucerus, King of Ardea, a town on the coast of Latium, who also came to the succour of Romulus. But from Varro we learn that the term Luceres was Etruscan, and Festus himself, in another passage, derives it from a Lucumon, the chief of this band. Cicero tells us of the death of this Lucumon while fighting with the Romans against the Sabines.³ This Lucumon, then, is evidently no other than the Etruscan leader Vibenna Cæles. All doubt as to the correctness of this conclusion is dispelled when we recollect with Niebuhr that "lucumo" is merely a term descriptive of dignity among the Etruscans, and the error has clearly arisen from the habit of regarding it as a proper name.⁴

A further trace of the existence of the Etruscan element is to

rive this Etruscan version from what are termed the Claudian Tables, which are bronze tables discovered in 1528 at Lyons, where they are preserved, and on which is engraved a speech of the Emperor Claudius on the concession of the *jus senatorium* to the Gauls, or their right to be called senators. Previously the Annals of Tacitus, lib. ii. § 24, presented an analysis of this oration, the text of which has been thus preserved. A *fac-simile* of the text has been printed by M. Monfalcon, librarian to the municipality of Lyons, with its consent (1851, fol.) It is also to be found in the greater number of the editions of Tacitus. That the Emperor Claudius wrote an Etruscan version may be believed, inasmuch as we find from Suetonius that he wrote a Greek history of the Etruscans in twenty volumes, which are lost.

As to the primitive name of the Quirinal mount, vide Festus, on the words *Quirinalis collis et Egonium*.

¹ Festus, on the word *Lucerenses*: "Lucerenses, et Luceres, quæ pars

tertia Populi Romani est distributa a Tatío et Romulo, appellati sunt a Lucero Ardeæ rege, qui auxilio fuit Romulo adversus Tatium bellanti."

² Livy, lib. i. § 13: *Lucerum nominis et originis causa incerta est.*

³ Varro, *De lingua latina*, lib. v. § 55: "*Tutienses* a Tatío, *Ramnenses* a Romulo, *Luceres*, ut Junius, a Lucumone. Sed omnia hæc vocabula Tusca, ut Volnius, qui tragedias Tuscas scripsit, dicebat." Festus, on the word *Lucomedi*: "Lucomedi a duce suo Lucumone dicti, qui postea Lucerenses appellati sunt." Cicero, *De republica*, lib. ii. § 8: ". . . Et suo et Tatii nomine et Lucumonis, qui Romuli socius in Sabino prelio occiderat."

⁴ Servius, ad *Æneid.*, lib. ii. line 268: "Duodecim enim lucumones, qui reges sunt lingua Tuscorum, habebant." Et lib. viii. line 475: "Tuscia duodecim lucumones habuit, id est reges, quibus unus præerat." Also, lib. x. line 202, et lib. xi. line 10. Censorinus, *De die natali*, c. 4: "Lucumones, tam Etruriæ potentes."

be found in the account given by tradition of the arrival at Rome of Tarquin, with his people, from Tarquinii, one of the principal towns of Etruria. Thus each of the three elementary races which collectively founded Rome, supplied it with a king, the Latins, Sabines and Etruscans.

11. It must not be supposed that this Sabine element comprised the whole of the Sabine people, much less that the Etruscan element composed the whole of the powerful Etruscan nation; but they were clearly sections of these people—so clearly that we may concur with Florus, who observes in connection with the period subsequent to the “social war,” that the Roman people was a composite of Etruscan, Latin and Sabine, which had united the blood flowing from different sources and incorporated into one body its various members.¹

12. These considerations will enable us to grasp the principles of the customs and institutions of Rome from the view they give us of pre-existing nationalities, whence it derived its origin. Upon this broad basis we may take our stand, without carrying our researches into minute details. We learn from Censorinus that Varro divided the historic period into three epochs. The first he called *ἄδηλον* or unknown, because it is wrapt in the obscurity of ignorance; the second *μυθικόν*, because it abounds in fables; and the third, *ιστορικόν*, derives its materials from the record of events contained in annals that may be relied upon.² Vico in a similar manner, but with more depth of view, divides the historic epoch into the divine, the heroic and the human.³ Niebuhr still more closely follows Varro, and while adopting a tripartite system of division with reference to Roman history, in his first edition styles the primitive period the mythic or purely fabulous, the second mytho-historic or a mixture of facts and fables, and the third historic. His work will be read with interest, but caution must be exercised in following him through the imaginary

¹ Florus, lib. iii. § 19: “Quum Populus Romanus Etruscos, Latinos, Sabinosque miscuerit, et unum ex omnibus sanguinem ducat, corpus fecit ex

membris, et ex omnibus unus est.”

² Censorinus, *De die natali*, § 24.

³ Vico, *Principj di scienza nuova*, lib. iv. *Del corso che fanno le nazioni*.

recitals which he substitutes with the assurance of certainty for the fables of the two earlier periods. Legend may be substituted for legend, and conjecture for conjecture, but ideas that live in the traditions and literature of an entire nation, form themselves part of its history if only as representing the national faith. This is the principle we wish to follow. In his first edition, Niebuhr presents us with a Rome, a mere Etruscan colony, a little fortified town built on the Mons Palatinus and tracing its origin back to the era of the Pelasgi, and embodying in the course of time the villages on the neighbouring hills by which it was surrounded. Next he presents us with a Sabine town on Mons Quirinalis, and then an Etruscan town on Mons Cælius, thus reproducing under the shape of conjectures transformed into assertions the theory of the three national elements attested by antiquity, the Latin, the Sabine and Etruscan. Of the towns or villages of Remuria, Vaticanum, Quirium and Lucerum, the ancients have made no mention.

13. Bearing in mind this idea of the component element of the Roman people, at a period when their history commences, we are in a position to approach the study of their institutions. And as we shall here, even more than in the study of historic events, come in contact with the brilliant works of Vico and Niebuhr, which may not be ignored, although we are not able to accept their fundamental data, it appears necessary, before we proceed further, to place on record our view of the writings of these eminent authors.

The tendency of Vico is to generalize. His aim is to discover the general principles of law, as the laws are necessarily interwoven with the history of the human race. The history and the law of Rome are only introduced as examples, of great importance, it is true, on account of the attention they have received in modern times, but nevertheless as mere examples which the writer, not without using some constraint to mould them to suit his views, has adduced to illustrate certain philosophic dogmas of his own. The author's fertility of idea, his depth of view, the glimmering light of certain fundamental

principles which he imagines he has discovered, are characterized by that vagueness, incoherence, caprice and sometimes even the absence of sound reasoning, which are peculiar to writers of great genius. In connection with the study of the institutions now occupying our attention he has laid down general principles which ought to be accepted as indisputable, and others which ought to be as definitely rejected. And as to his details, they are in many respects unnecessary to a thorough acquaintance with Roman law, and a jurist, guided in his study of the subject by the document before him, would be justified in rejecting them as fanciful.

The special subject of Niebuhr's work is the history of Rome, in which considerable attention is bestowed upon the institutions. It is a work of much learned research, and the author, who delights in the minutest details of archæological investigation, has freely consulted and made use of the evidence afforded by relics of antiquity. Though he does not profess to be a jurist, still the student is indebted to him for the greatest service rendered to the study of Roman law in modern times—the production of the *Institutes of Gaius*, of which he was the first to discover the palimpsest. For this we owe him a deep debt of gratitude. As a critic he was subtle and ingenious; as a writer he could call to his aid a brilliant imagination and the conceptions of a poet. But like many archæologists he is prone to self-deception, at one time being too visionary, at another under a conviction which he will not allow to be disputable, he relates as fact that which is mere fancy, without affording the slightest indication of the licence he has taken. Consequently his work is in places a collection of antiquarian dissertations, which as intercalations are always instructive, though long and tedious; in others his style is most attractive, and his delineations full of life. It is no matter of surprise, therefore, that upon a great number of points his labours have thrown much light and have materially assisted the jurist in his study of Roman law, more particularly with reference to the period when the history of this law begins to emerge from the obscurity of its early origin. But in his treatment of the Roman constitution and the divisions and social relations of the different

classes of the population at this epoch, in the absence of documentary evidence he has trusted too much to imagination. It is, therefore, only with the utmost caution that many of his ideas in this particular branch of the subject can be introduced into a history of the law. He appears to us to start from an erroneous basis, and we consider it hazardous to admit theories, constructed with no attention to critical accuracy, into an elementary work in which nothing should find a place except established truths. Preoccupied with examples derived from the history of society in the middle ages, and especially of the petty states of Germany, Niebuhr, even in the terminology adopted by him on a principle completely at variance with the language of the Romans, has occasionally produced the same effect—if I may be permitted to use such an illustration in a subject of this nature—as would be produced by a painter who should represent Abraham as about to accomplish the sacrifice of his son with firearms.

14. Whatever licence may be allowed a writer treating of ordinary history, in that of jurisprudence there should be no room for the play of the imagination, for it is a subject that requires to be handled with the most severe and scrupulous exactness. We have accordingly, so far as is possible, derived our materials solely from written sources left us by the Romans themselves. We are about to follow the history of this people throughout their career of development, and in doing so, we shall have our attention directed to the public, the sacred, the private law, and the customs of the people successively. The first—public law—comprises the constitution, the machinery of legislation, the administration of justice, the appointments to office, the right of contracting peace or making war. The sacred law, which among the Romans was intimately connected with and formed a branch of political law, regulated the ceremonies of religion, and their observance in public and private life, and the election and authority of the pontiffs. Private law is that which concerned the interest of individuals in their mutual relations with each other, and regulated their marriages, their contracts, their property and their inheritance. And, lastly, we

shall consider custom, the influence of which was equally great over public, sacred and private law.

The divisions of the population into patricians and plebeians, into patrons and clients, whence the patrician “gens,” the whole forming collectively the *Populus Romanus*; its distribution into three tribes and thirty curies; the assembly of the curies; the senate; the kingly office, are the political institutions whose origin was attributed by Roman tradition to the time of Romulus, and all of which, by the common consent of historians, poets, statesmen and jurists, are ascribed to the first king.¹ The existence of these institutions, which either in their entirety or in fragmentary portions, have been carried on from age to age, through gradual modifications and transformations, cannot be called in question, but it is impossible to give, with any certainty, a detailed account of their origin or organization in early times, because the only writings worthy of reliance that refer to the subject are wanting in these details. But this much may be asserted with confidence, that these institutions were but imitations of similar institutions in vogue at the same time among other Italian nations.



SECTION II.

PATRICIANS AND PLEBEIANS (*Patres, Patricii; Plebs, Plebeii*).

PATRONS AND CLIENTS (*Patroni, Clientes*).

PATRICIAN “GENTES” (*Populus Romanus*).

15. The commencement of civilization was not, as poets tell us, a golden age, or an age of wisdom, equality and liberty, for the march of human progress is in an opposite direction. And we may accept, as an undisputed fact, the axiom laid down by Vico, that nature everywhere commences with the gross and unrefined. The birth of nations is in slavery, inequality, and ignorance; and the Italian nations, among which Rome was founded, were no exceptions to the rule. Their people were

¹ See Cicero, *De republica*, lib. ii. § 8.

either slaves or aristocrats. We must not, therefore, be surprised to find the people in the earliest times divided into classes differing widely in their condition, a superior and dominant caste having the right of intermarriage, equal privileges, a monopoly of sacerdotal, political and judicial functions—the patricians (*patres, patricii*); and an inferior and subject class, prohibited from alliance with the former, neither admitted to its rights or its laws, distributed among the different families of the patricians, from whom they received protection as an incident of clientage, and excluded from public functions—these were the plebeians, or plebs (*plebs, plebei*); and, finally, a third class, which in no degree formed part of the State, without civil rights, and living the life of animals, being regarded by the head of the family in no other light than as mere property—a chattel. These were the slaves (*servi, mancipia*). The explanation of this classification is to be sought for in the diversified origin of the Roman population, in the distinct elements of which it was composed, in the fact of there being an asylum among them ever open to the stranger or the fugitive slave, in the then existing customs of war, and the fate which awaited the inhabitants of towns and districts either in the character of captives or conquered people. This is a field of study long since explored. And it must be borne in mind that these social characteristics were those of all the Italian nations of the period, among which Rome subsequently attained pre-eminence. Each of the Italian towns and petty states had its superior and governing, and its inferior and governed class. Clientage, slavery and enfranchisement were in vogue, and produced everywhere analogous results. “The nations by which we are surrounded,” said Appius Claudius, in his vehement harangue against the plebeians, “are governed by the great, and there is not one of them which presents an instance of equal legal rights being shared by the governing and the governed classes.”¹ Censorinus, speaking of the miraculous birth of men, relates a story found in the books of the Etruscans, that in a field forming part of the territory of Tarquinii,

¹ Dion. lib. vi. § 54.

the plough turned up from the furrows an infant, Tages, who commenced teaching the art of divination, which was committed to writing by the "lucumons." This was at the time the governing class in Etruria, and held the same position as the patricians at Rome,¹ which in this respect resembled the other Italian cities, although it placed its peculiar complexion and stamp upon its institutions. And it is by attention to this division of the Roman people that the study of their public or private laws is to be commenced. The two castes, the patrician and plebeian, present a clearly defined line of demarcation between the two elements, whose disputes and struggles ultimately result in a perfect equality of *social status*, legal rights and customs.

16. Another of the ancient Italian institutions is the bond of clientage: and the history of Rome itself furnishes us with proof of its existence in the other nations of Italy. Thus we find Attus Clausus, a noble Sabine, afterwards known at Rome as Appius Claudius, flying from Regillum to seek refuge in Rome accompanied by a large number of his clients (*magna clientum comitatus manu*). Dionysius goes so far as to assert that five thousand was about the number of relations and clients, fit to bear arms, who accompanied him.² Again, at the siege of Veii, we find nobles from all parts of Etruria flocking, with their clients, to the succour of the city.³ An exact and detailed acquaintance with this institution, if in our possession, would throw great light upon the social condition of the Romans, upon the composition of the great patrician houses, and upon many important points connected with public and private law.

This bond of clientage between the patricians and those who attached themselves to them in the capacity of clients, gave rise to a new distinction in the relative position of persons, that of patrons (*patroni*) and of clients (*clientes*). The classic authority

¹ Censorinus, § 4, *in fine*: "Nec non in agro Tarquiniensi puer dicitur exaratus, nomine Tages, qui disciplinam cecinerit extispicii: quam lucumones, tum Etruriæ potentes, exscripserunt." See also Cicero, *De divinatione*, lib. ii.

§ 23, and Ammian. Marcellin. lib. xxi. § 1.

² Livy, lib. ii. § 16; Dion. lib. v. § 39.

³ Dion. lib. ix. § 5.

on this subject is Dionysius,¹ who shows that reciprocal rights and duties, though differing in kind, existed between the patron and the client. On the part of the patron towards the clients there was the duty of protection, assistance and instruction in the law, a general regard for their interests and oversight of their affairs during their presence or absence, and the obligation of commencing or defending all actions necessary for their protection. This writer here confines himself to obligations connected with legal rights, the management of pecuniary matters and litigation, which, from the earliest times, were regarded as affairs of the utmost importance among the Romans. The picture is correct so far as it is confined to the period when Dionysius of Halicarnassus wrote; but in other respects it requires to be supplemented. The pecuniary burdens to be borne by the clients for the benefit of their patrons were marriage portions for the daughters of the latter, the ransom of the patron or his sons from captivity, cesses for roads, cost of unsuccessful litigation, the payment of fines, expenses connected with the magisterial offices and all other public charges. On the part of both, such was the reciprocity of obligation, it was forbidden for one to be the accuser or a witness against the other, or to lend assistance to or join the ranks of his enemy. Whoever was guilty of any of these acts became liable to the law against traitors and to be sacrificed to the gods (*sacer esto*). And it is a proof of the great antiquity of this institution among the Italian nations, that it belonged to a period when human sacrifices were in vogue, and when the guilty were immolated at religious festivals upon the altar of the deity to whom they had been dedicated. Dionysius of Halicarnassus, speaking of the time of which he wrote, tells us that it was lawful for every one to kill them with impunity; and this is confirmed by Festus, on the meaning of the word "*sacer*."

It is impossible not to recognize a great similarity, though under very different aspects, between the relations that existed between the patron and his client and those established in our feudal period between the lord and his vassal. In the case of

¹ Dion. lib. ii. § 9 et seq.

subsidies the connection was exactly similar, viz. the marriage portion of the eldest daughter and the ransom from captivity.

The tradition of this bond of union between the patron and his client was long retained as a Roman maxim in times when the primitive character of the institution was almost entirely forgotten. Virgil, in his description of the infernal regions, subjects to the same punishment the man who has struck his father and the patron who has practised fraud upon his client—

“Pulsatusve parens, et fraus innexa clienti.”¹

Aulus Gellius represents a conversation as taking place between certain sages and some noble Romans concerning the relative importance attributed by ancient custom to family and to social obligations (*officia*). Here it is at once admitted that immediately after the observance of duty to parents (*parentes*) comes that of a guardian to his ward, and in the second place that towards the client, “qui sese itidem in fidem patrociniūque nostrum dederunt.” In the third place are ranked duties towards a guest, and after these duties towards *cognati* and allies. And Aulus Gellius is confirmed by the discourses of M. Cato, of the Pontifex Maximus, C. Cæsar, and the writings of the jurist Massurius Sabinus. Cato says, “testimony may be given in favour of a client, against *cognati*, by a patron; but none can be given against a client. Next to the name of father that of patron stands highest.”²

One of the illusions of Niebuhr, which we reject, is his theory that the clients were an order of the people entirely distinct from the plebeians. He gives them a distinct origin and an independent position in order to bear out his conclusion, which after all is immaterial, that the plebeians in their struggle

¹ Virgil, *Æn.*, lib. vi. line 609.

² Aul. Gell. lib. v. ch. 13. The speech of Cato, quoted by him: “Adversus cognatos pro cliente testatur; testimonium adversus clientem nemo dicit: patrem primum, postea patronum proximum nomen habere.” Of Massurius Sabinus: “In officiis apud majores ita observatum est, primum tutelæ, deinde hospiti, deinde clienti, tum cognato, postea affini.” Of C. Cæsar:

“Nam neque hominum morte memoria deleri debet, quin a proximis retineatur; neque clientes sine summa infamia deseriri possunt; quibus etiam a propinquis nostris opem ferre instituimus.” So Aul. Gell. lib. xx. ch. 1, in his commentary on the law of the Twelve Tables: “Sic (Populus Romanus) clientem in fidem acceptum cariorum haberi quam propinquos, tuendumque esse contra cognatos censuit.”

against the patricians were not revolted clients, but that they were an oppressed section of the population rising against their oppressors. Clientage, whatever may have been its advantages, was a species of service—the subjection of an inferior to a superior caste. Clients or no clients, they were governed by the patricians, the privileged race monopolizing the spiritual and secular government of the state. There is no necessity to seek for any other explanation or apology for the struggle. The entire testimony of antiquity convinces us that the clients formed part of an inferior class. It is almost capable of demonstration that, in the first ages of Rome, all the plebeians were distributed among and attached to the several patrician houses by the bond of clientage, if not already enfranchised. This is supported by the popular tradition of Romulus. Cicero makes this remark in his treatise on the Republic,¹ and M. Manlius, in his oration to the plebeians against the patricians, bids them calculate their own numbers and that of their adversaries. “So many clients as you were formerly, when subservient to one patron, so many will you now be against one enemy.”²

This much is certain, that as a result of the continuous increase of the plebeians in proportion to the growth of power in Rome and the increase of population, a time arrived when the number of plebeians attached as clients to the patrician houses was exceedingly small in comparison with the great body of plebeians not so attached. And the bond by which they were united to their patrons, the duties imposed by virtue of their position as clients, their enrolment in the first organization of the *comitia* in the families of their patrons (although we have no certain knowledge how that enrolment was effected), the prohibition against lending aid to the enemies of their patrons under pain of being adjudged traitors, all contributed to place them in the situation of apparent supporters of the patricians in the struggle with the plebeians, and caused them to be regarded as forming a part of the patrician force, and sometimes as mediators and intercessors between the contending parties.

¹ Cicero, *De republica*, lib. ii. § 9: “Et habuit (Romulus) plebem in clientelas principum descriptam; quod quantæ fuerit utilitati, post videro.”

² Livy, lib. vi. § 18: “Quot enim clientes circa singulos fuistis patronos, tot nunc adversus unum hostem eritis.”

And it is equally certain that in the deliberations of the plebeian tribes, where they were numerically insignificant, their influence ceased to be the same as in the other assemblies. From all the texts collected by Niebuhr in support of his peculiar views, there is not one that militates against the truth of these conclusions.

But the picture which Dionysius of Halicarnassus supplies regarding the institution of clientage is deficient in many features which are necessary to convey a clear idea of the social condition of the people at this early period of their history. Some of these features, which have no doubt been effaced by time, we may discover in the study of what are known as the patrician "*gens*" or "*gentes*."

17. Here again, notwithstanding the credit accorded to Niebuhr by other writers, we place no reliance on the theory he has invented, nor can we accept the figure three hundred, which, according to him, was the number of the patrician "*gentes*." Such a limit, ingenious as may appear the combination of numbers by which it is determined, is inadmissible in connection with a matter so variable as that of the number of "*gentes*," which of necessity was ever fluctuating—a fact admitted by Niebuhr himself in other matters not involving these symmetrical rules. Notwithstanding the absence of written authorities on this point, we still have sufficient data to enable us to form an estimate of the Roman "*gens*," accurate enough for the jurist, preferable to that of Niebuhr and far more simple, and one which possesses the requisite precision for the application of the law regarding it. As we shall enter at length into this discussion in treating of the succession of the "*gens*," it will be sufficient to give in this place a summary of the results at which we have arrived.¹

The first requisite to constitute a *gens*, that is to say, an entirety, a genealogical aggregation, was the fact that in retracing the descent to the ultimate stock, no instance could be found of an ancestor having ever been in a state of slavery, or any kind of vassalage whatever. This is the definition given by the

¹ See Ortolan's *Institutes*, vol. iii. end of title 2

Pontiff Scævola and quoted verbatim by Cicero.¹ For in early times, as we shall shortly see, not only were the patricians alone in such a position, but the very idea could not enter into the mind of a plebeian of ever attaining to such a position. In fact, by combining the results of these two ancient institutions of the Italian nations—on the one hand, slavery and enfranchisement; on the other, clientage—if we go back to the period when every plebeian who was not either an enfranchised man or the descendant of one, was a client, we see clearly that no one of plebeian origin either in his own person or that of his ancestor was free from the taint of slavery or some form of vassalage. The patricians alone could claim such an origin—a pure blood: they alone were able to form by the reunion of different branches, sprung from a common stock, and united by the ties of agnation, a *gens*; they alone could possess the qualification of *gentiles*, that qualification which, stripped of a portion of its ancient signification, has been handed down to us by tradition, and which is expressed in the languages of modern Europe by the terms “gentilhomme,” “gentilhuomo,” “gentilhombre” and “gentleman.”

The most prominently marked feature of the period to which we refer—a feature which the more readily escapes the memory because, as time passes, or society becomes renewed, or laws changed, the reality of the past disappears—was that at the foundation of Rome all of the population who were not patricians were distributed among that order.

In fact, to each patrician “gens” there were attached two accessory subordinate classes, the clients of the patrician of the *gens* with their descendants, and the descendants of their enfranchised.

The clients, as well as the enfranchised, adopted, with a peculiar termination, the name of the *gens* to which they were attached in a kind of civil relationship; and the title of “patron,” diminutive of “pater,” indicated both this species of relationship and the powers which resulted from it.

They were attached consequently, with their descendants, to

¹ “Quorum majorum nemo servitutem servivit.” (Cic. Top. § 6.)

the religious rites and sacrifices peculiar to their "*gens*" (*sacra gentilitia*); they had as their "*gentiles*" the members of the *gens* to which they belonged, in the order of their respective degrees of agnation; for, as in tracing their pedigree, they in each case arrived at an ancestor who had been tainted by slavery or clientage, they could not point to any individual as their personal gentile, but were, so to say, placed derivatively in the genealogy of another. "Have you ever heard who constituted the first Roman patricians? Certainly not men who fell from heaven, but those only who were able to specify their ancestors; in other words, none but the '*ingenui*.'"¹

"*Ingenuus*," a word whose legal signification has changed with the modification of the social condition of those to whom it has been applied, indicated, in primitive Roman history, one who was born in a *gens*, one who had a genealogy, one who could show a line of descent free to its fountain source from every taint of vassalage. In short, if the patricians did not declare themselves actually descended from heaven, they, at least, not unfrequently laid claim to have been instructed by those who had thence descended—such were, for example, the lucumons of Etruria, receiving from the mouth of the divine Tages the secrets of the art of divination.²

The notion of the *gens* is completed by another feature, the right of tutelage and inheritance enjoyed by the patron as to his clients and their descendants—rights which in default of tutors and legitimate heirs finally devolved upon the patricians of the *gens* of which these families were dependent.

All who have carefully studied Roman antiquities have been satisfied of the existence of these rights of tutelage and succession to the client and his descendants and to the enfranchised, although they may not have been able to find it anywhere specifically mentioned, because this constitutes the basis, so to

¹ "Semper ista audita sunt eadem, penes vos auspicia esse, vos solos gentem habere, vos solos justum imperium et auspicia domi militiæque. . . . En unquam fando audistis, patricos primo esse factos, non de cœlo dimissos, sed qui patrem ciere possent, id est, nihil ultra quam ingenuos." (Oration of

Publius Decius Mus, Livy, lib. x. § 8. We shall give shortly the exact meaning of the words "*patrem ciere possent*." "Patricos, Cincius ait in libro de Comitibus, eos appellari solitos, qui nunc ingenui vocantur." (Aul. Gell. on the word *Patricos*.)

² Vide supra, § 15.

speak, of all that is written concerning the tutelage or succession of the gentiles.¹

Notwithstanding the complication produced by the intermixture of different groups of families, the degrees of gentility were measured and could be legally computed for each individual from their respective degrees of agnation.

18. The client and all belonging to him, dependents of the *gens* of his patrician patron, was a familiar (*familiaris*) of his patron, that is to say, was comprised within his family, the word *familia* being taken in its widest signification, extending to and including property, slaves enfranchised, clients and all other persons in whatever capacity, if under the power of the chief. Some of these clients resided in the house of their patron; others received from him plots of land to cultivate. This distribution of land by the patricians amongst the plebeians, their clients, is mentioned by several writers. Lydus, in his treatise on the Magistracies of the Roman Republic,² says that the patricians have given to their *familiares* the name of clients, from *clientes*, a contraction of *colientes*, on account of the respect and the devotion due from the familiar to them. Was it not rather on account of their cultivating their lands, and would not the word *clientes* correspond in origin to *coloni*?

19. Roman etymologists have differed as to the origin of the words *patres*, *patricii*, applied to senators and to members of the superior and dominant class. The *patres* were the senators, the *patricii* their descendants. The name *patres* was most probably given to the senators, either on account of their age, of their paternal solicitude, or because it was the duty of the senate to divide the lands amongst the plebeians, as fathers to their children.³ The name of *patricii* was given to those

¹ We may see here some trace of clientage among foreigners where there can be no question about the succession of the Gentiles.

² Lib. i. § 20.

³ Cicero, *De republica*, lib. ii. § 8: "In regium consilium (Romulus) delegat principes, qui appellati sunt pater-

ter caritatem Patres." And § 12: "Quibus ipse rex tantum tribuisset, ut eos patres vellet nominari, patrichesque eorum liberos." Sallust, *Catilinæ*, § 6: "Hi vel ætate, vel curæ similitudine, Patres appellabantur." Festus, on the word *Patres*: "Patres appellantur, ex quibus senatus constat, quos initio urbis

who were able to trace their descent, that is to say, who were derived from a stock that had always been free from any form of vassalage.¹ The fact is, the word *pater*, both as a legal and common term, essentially implies, in connection with primitive times, the idea of power, and with the early Romans that of almost absolute power. Thus the head of the family is termed by the Romans *pater familias*, whether he had children or not, whether married or single, or even if an infant in his cradle, his family consisting of his chattels, his slaves, his enfranchised or his clients. Thus, to express the position of a married woman, and the power of her husband over her, the Romans said that she was *loco filia*, i. e. in the situation of a daughter; again, to express the degree of power exercisable over the enfranchised and the clients, which was not so great as that over a child or slave, the word "patronus," the diminutive of *pater*, was employed. The terms *patres* and *patricii*, applied to the dominant class at a period when it had under its control, either by enfranchisement or clientage, the entire plebeian population, involved no other idea than that of power. The idea, indeed, conveyed by these terms in ancient times was not one of tenderness, but solely that of "might." Florus was not far from the truth when he said, speaking of the senate, "ex auctoritate patres;" and Festus is strictly accurate in saying, "It is manifest that the patricians were by the ancients called patrons, because they were, according to the custom of the period, as much the masters of their clients as the father is that of his children."²

The term "patres" is the more ancient of the two; the word "patricii" is derived from it, and is generally synonymous with it, though it may be possible to point out some slight shades of difference; and the *patres* were the heads of the families of the upper class, having subject to and distributed among them the

conditæ Romulus C. delegit, et sic appellavit, quorum consilio atque prudentia respublica administraretur atque gubernaretur; quique agrorum partes adtribuerent tenuioribus perinde ac liberis, ac pecunnias dividerent."

¹ Vide supra, § 17, note.

² Florus, lib. i. § 1: "Consilium rei-

publicæ penes senes esset, qui ex auctoritate Patres, ob ætatem Senatus vocabantur." Festus, on the word *Patronus*: "Patronus ab antiquis cur dictus sit, manifestum; quia ut patres filiorum, sic hi numerari inter dominos clientum consueverunt."

entire plebeian population. The "patricii" are all members of this class, whether heads of families or not. The term *patres* was by no means synonymous with *senatores*, nor was it exclusively applied to senators, nor were the patricians necessarily descendants of senators: for the superior and dominant class did not spring from the senate, but, on the other hand, the senate was composed of members of that class, and this was the case throughout all the Italian cities. The permanent broad line of contrast is between patrician and plebeian.

From what has been already said, we are now in a position to appreciate the ancient definition of patrician—"qui patrem ciere possent, id est, nihil ultra quam ingenuos." The true ancient meaning was this: "Those who could trace their descent to a *pater*, who were born in a *gens*."¹ The counterpart is to be found in the definition of the plebeian given by the jurist Capito, "*Plebes, in qua gentes civium patriciæ non insunt*," that portion of the people in which the patrician *gentes* are not included.²

And it is clear that Publius Decius Mus, in the way in which he represents the ancient definition of the word patrician, plays upon the words and the change that had come over public spirit even in his time. However, he touches upon the ancient signification when he afterwards said, "As soon as I can mention a consul as being my father, so soon can my son speak of him as his grandfather."

20. Nor can we any more accept the opinion of Niebuhr, who follows Vico in this respect, that the plebeians at the commencement did not form a part of the Roman *populus*. From the beginning and at all times the "Populus Romanus" was the united body of patricians and plebeians. Such is the definition given by Roman jurists and writers of every age.

The numerous passages quoted by Niebuhr,³ in which the two

¹ We do not adopt the common translation, "Those who can name their father," which is absurd; *Pater* here expresses the old Roman chief.

² Aul. Gell. lib. x. § 20: "*Plebem autem Capito in eadem definitione secorsum a populo divisit: quoniam in*

populo omnis pars civitatis omnesque ejus ordines contineantur; plebes vero ea dicitur in qua gentes civium patriciæ non insunt."

³ Vide vol. ii. p. 163 et seq. of the French translation.

words "populus plebsque Romana" appear united, no more authorizes the conclusion Niebuhr draws from this fact than it warrants our arguing from the well-known phrase, "Senatus populusque Romanus," that the members of the senate did not form part of the "populus." The same turn of expression with the double pleonasm is to be found at a period when there is certainly no room for doubt. For example, in the subscription to a letter written by Lepidus, and preserved in the collection of *Epistolæ Familiares*, there occurs this expression:—"Lepidus Imperator iterum, Pontifex Maximus, salutem dicit Senatui, populo, plebique Romanæ."

The same pleonasm occurs in the two significant passages of Festus, which, in the Farnese manuscript, follow and supplement each other:—"Populi commune est in legibus ferendis cum plebe suffragium.—Patrum commune cum populo suffragium, quibus suffragantibus fit populiscitum."¹

SECTION III.

TRIBES AND CURIES (*Tribus et Curiae*).

21. The Roman people are represented as being divided from the earliest period into three tribes—the Ramnenses, Tatienses and Luceres.

We are told by Cicero, Varro and Festus, who obtained their information from the earliest writers, that these appellations are respectively derived from Romulus, the chief of the Latins, Tatius, the chief of the Sabines, and from Lucumon, the chief of the Etruscans. We are warranted in regarding these three tribes as the three distinct nationalities which collectively laid the foundation of the Roman nation.² Varro, however, tells us that all three denominations were Etruscan. This tripartite division was also territorial; the Roman territory, or *ager Romanus*, being divided into three parts; the one assigned to the Ramnenses, another to the Tatienses, and the third to the

¹ Festus, on the word *Populi*.

² Vide *supra*, pars. 9 and 10.

Luceres. So that these three primitive tribes were at once local and personal, each comprising at the same time a section of the people as well as retaining the territory of their respective nationalities.¹ We find in Cicero that L. Tarquinius, among the alterations he suggested, desired to change these names Tatienses, Ramnenses and Luceres, but that he was prevented by the formidable opposition of the famous augur Attius Navius.²

22. In the first subdivision of each tribe into ten curies, we find the entire Roman people distributed into thirty curies. Popular tradition relates that each of these curies received the name of one of the Sabine women who, during the progress of the battle that followed the rape of the Sabines, threw themselves between the combatants and became the mediators of peace between the Romans and their own people. Cicero does not hesitate to relate this tradition, which is also to be found in Livy, Festus and elsewhere,³ though some Roman writers refuse to accept it, and assign a different origin to the names of the curies.

Dionysius of Halicarnassus refers ⁴ to a second subdivision of each *curia* into ten *decuriæ*. This subdivision, however, is less known, and is of comparatively little importance to the constitutional or legal historian. Whereas, in both cases, the

¹ Cicero, *De republica*, lib. ii. § 8: "Populumque et suo et Tatii nomine, et Lucumonis qui Romuli socius in Sabino prælio occiderat, in tribus tres, curiasque triginta descripserat (Romulus)." Varro, *De lingua latina*, lib. v. § 55: "Ager Romanus primum divisus in partes tres, a quo *tribus* appellata Tatiensium, Ramnium, Lucerum: nominatæ, ut ait Ennius, *Tatienses* a Tatio, *Ramnenses* a Romulo, *Luceres*, ut Junius, a Lucumone. Sed omnia hæc vocabula Tusca, ut Volnius, qui tragœdias Tuscas scripsit, dicebat." Festus, on the word *Titiensis*: "Titiensis tribus a prænominis Tatii regis appellata videtur. Titia quoque curia ab eodem rege est dicta." On the word *Lucomedi*, cited *supra*, § 10, note 3.

² Cicero, *De republica*, lib. ii. § 20: "Nec potuit (L. Tarquinius) Titiensium et Ramnensium et Lucerum mutare quum cuperet nomina, quod auctor ei summa augur gloria Attius Navius non erat."

³ Cicero, *De republica*, lib. ii. § 8: "Populum . . . in tribus tres, curiasque triginta descripserat (Romulus), quas curias earum nominibus nuncupavit, quæ ex Sabinis virgines raptæ, postea fuerant oratrices pacis et fœderis." Livy, lib. i. § 13: "Ex bello tam tristi, læta repente pax cariores Sabinas viris ac parentibus, et ante omnes Romulo ipsi, fecit. Itaque, quum populum in curias triginta divideret, nomina earum curiis imposuit."

⁴ Lib. ii. § 7.

division into thirty curies is a matter of considerable importance and merits particular attention from the very first.

23. The members of the same tribe and those of the same *curia*, besides the bond of a common national origin—Latin, Sabine, or Etruscan, which would gradually become weaker as the fusion of the several races became more complete—were united by ties of a different character. There was first the bond of religious unity. In addition to the faith and rites common to the entire tribe, each *curia* had its tutelary deity, its peculiar creed and its characteristic sacrifices (*curionia sacra*), its priests (*curiones*, *curiales flamines*, *curiarum sacerdotes*), its fêtes, and its annual festivals. There was, secondly, the bond of military service; for it was the duty of each tribe to furnish for each legion, recruited from its own curies, a thousand men.¹ Thirdly, there was the political bond; for the voters could only exercise the right of vote in conjunction with the other members of their *curia*. And, lastly, there was a bond of union in the details of administration and internal organization peculiar to each *curia*.

The members of the tribe designated each other “tribules;” those of the *curia* “curiales.”²

24. There can be no doubt that this ancient organization by curies had an aristocratic origin. The details of the system, it is true, are unknown to us; but whatever they may have been, it is sufficient to refer to what has gone before to enable us to understand how in these primitive times, when every plebeian was attached, either by the ties of clientage or enfranchisement, to some patrician, it happened that each patrician *gens* formed a species of group, encircling and absorbing in itself its plebeian subordinates. This does not imply that it did not embrace the plebeians, or that the curies consisted solely of patricians. Assuredly Plautus’s miser, who hurried off to take his share of

¹ Varro, *De ling. lat.*, lib. v. c. 89.

² Festus: “Curiales ejusdem curiæ, ut tribules, et municipes.—Curiales flamines, curiarum sacerdotes.—Curionia sacra, quæ in curiis fiebant.—Curioni-

um æs dicebatur, quod dabatur curioni ob sacerdotium curionatus.” Varro, lib. v. § 83: “Curiones dicti a curiis, qui fiunt ut in his sacra faciant.”

the money that was to be distributed by the chief of his *curia* (*nostræ magister curiæ*), lest his treason should be suspected, was not a patrician.¹

25. The term *curia* had several significations other than that just given. It was applied, for instance, to the place where the priests of the curies met together to perform their religious functions, to the place where the senate assembled for the discharge of public business, and to the local senate of the respective towns. Care is therefore necessary not to confound these different objects expressed by the same term. It may be observed that the majority of Roman etymologists assign the same root to the word when used in either sense, viz., *curare*, to take care (of).²

26. The word *tribus* had in like manner its various significations and derivations. In proportion as the fusion of races was completed and unity accomplished, the ancient division into the three primitive tribes, each representing its individual nationality, disappeared. And in time a new classification by tribes, with entirely different characteristics, was made, to which we shall shortly turn our attention. The growth of the population and the corresponding extension of the city led to a like increase in the number of the tribes, which ultimately reached thirty-five. It is thus most necessary to avoid confounding these new tribes, totally different in origin, and destined to

¹ Plautus, *Aulularia*, act. i. sc. 4:—

Nam pater noster qui est magister curiæ,
Dividere argenti illat numos in viros.

This *diculere argenti numos* recalls to our memory the *consuetudo pecuniarum dividenda*, in the definition of the patricians, by Festus. (See above, § 13, note 3.)

² Varro, *De Lingua Latina*, lib. v. § 155: "*Curia* duorum generum: nam et ibi curant sacerdotibus res divinas, ut *Curia Veteres*, et ibi senatus humanus, ut *Curia Hostilia*, quod primum edificavit Hostilius rex." Festus, on the word *Curia*: "*Curia*, locus est ubi publicæ curiæ gerebantur. Cuiusmodi curiæ dicebantur, ubi tantum ratio sacrorum

gerebatur. Curie etiam nominantur, in quibus unusquisque partis populi Romani quid geritur: quales sunt eæ, in quas Romulus populum distribuit numero triginta (quibus postea additæ sunt quinque) ut in sua quisque curia sacra publica faceret, feriasque observaret. Hisque curiis singulis nomina Curiarum virginum imposita esse dicuntur, quas virginibus quondam Romani de Sabinis rapuerunt." The parenthesis (*quibus postea additæ sunt quinque*) contains a confusion between the curies and the thirty-five tribes which subsequently came into existence—a confusion which is repeated in Festus on the word *Consuetudo*.

occupy a most important position in the affairs of the republic, with the three primitive tribes just described.

SECTION IV.

ASSEMBLY BY CURIES (*Comitia curiata*).

27. The meeting of the thirty curies for deliberation upon public business constitutes the most ancient Roman assembly.

These were the religious and aristocratic gatherings convoked by the lictors, held in the centre of the city, in that part of the forum at the foot of the Capitol known as the Comitium, under the sanction of sacerdotal rites, and where patrician influence was preeminently conspicuous.¹

It was here that the election took place for those sacerdotal offices which were within the gift of the "populus," where magistrates were appointed, and the king selected. Here also that famous law, the "lex curiata," was passed, the true nature of which remained a mystery till the discovery of Cicero's work upon the Republic. This left no doubt that it was the law of investiture, without which no magistrate, not even the king himself, though duly elected, could have conferred upon him the "imperium," or right to command. Here the composition of families was determined, and testamentary successions regulated—two matters of the utmost importance to the maintenance of an aristocracy, more especially when they involved admission to the peculiar privileges (*sacra privata*) of a religious caste.

The jurist will recognize this assembly of the curies as the first Roman legislative assembly.

28. The extent of its power, however, must not be exaggerated, for this power was limited in many directions. The curies could only assemble when convoked. They could only

¹ Varro, *De lingua latina*, lib. v. § 155: "*Comitium*, ab eo quod coibant eo comitiis curiatis et litium causa." Festus, on the word *Comitiales*: "*Comitiales dies* appellabant, quum in

comitio conveniebant; qui locus a coeundo, id est simul veniendo, dictus est." Aul. Gell. lib. xv. ch. 27: "*Curiata* (comitia) per lictorem curiatum calari, id est convocari."

meet to transact one matter. The magistrates who had the right to convoke were patricians, acting under the order of the senate. The augurs, whose presence was absolutely necessary, were patricians. A favourable auspice must have preceded a convocation. The will of the assembly must be expressed by the simple affirmative or negative; and should the vote take an unlooked-for turn, it was competent for any augur or magistrate having the auspice at any moment to declare the assembly dissolved by the mere utterance of the formula *alio die*, indicating that the auspice was unfavourable. If Jupiter thundered, that is, to the right—or, what was the same thing, if the augur or the magistrate declared that he did,—the assembly was dissolved; all which, says Cicero, was to secure to certain nobles the determination of all matters,¹ and even when the decision was given, in order to render it effective the confirmation of the senate was requisite (*auctor fieri*).² This necessary action of both bodies is concisely expressed by Cicero in the sentence, “Potestas in populo, auctoritas in senatu sit.”³ The jurist will understand the force of the word “auctoritas” here, as used by a Roman.

29. It was not the function of the Romans, in their elective assemblies, to take the votes of individual members, as is the practice in modern times; but the electors were arranged in groups, each group having one vote. In this instance they were grouped by Curies, each *Curia* having consequently one vote. The order in which the votes of the curies should be taken was determined by lot without reference to the tribe to which they belonged, whether Ramnenses, Tatienses, or Luceres. Livy says, that those upon whom the lot fell to vote first were called “principium.”⁴ As soon as sixteen curies

¹ Cicero, *De divinatione*, lib. ii. § 35: “Fulmen sinistrum, auspiciū optimū habemus ad omnes res, præterquam ad comitiā: quod quidem institutum reipublicæ causa est, ut comitiarum, vel in iudiciis populi, vel in iure legum, vel in creandis magistratibus, principes civitatis essent interpretes.”

² Livy, lib. i. § 17: “Decreverunt enim (patres) ut, quum populus regem

jussisset, id sic ratum esset, si patres auctores fierent. Tum interrex, concione advocata: ‘Quod bonum, faustum, felixque sit, inquit, Quirites, regem create; ita Patribus visum est. Patres deinde, si dignum, qui secundus ab Romulo numeretur, crearit, auctores fient.’”

³ Cic. *De legibus*, lib. iii. § 12.

⁴ Livy, lib. ix. § 38: “Fauca curie

had voted the same way, the majority being ascertained, the decision was declared, and the others did not vote.

30. It is matter of question how the modes in which the curies should vote was determined—whether or not each individual opinion was taken (*viritim*), and that of the majority adopted. This view rests upon a passage in Livy.¹ Niebuhr is of opinion—and there is much reason in what he says, judging from an expression in Aulus Gellius,—that the members of each *curia* were arranged in their respective *gentes*, and that each *gens* had a vote, the majority of which determined that of the *curia*. This interpretation would be in harmony with the social condition of the period, as already explained, and would present us with the picture of the patricians of each *gens* marching forward, followed by the long train of their dependants, solemnly to register their vote. But we are convinced, that the expression of Aulus Gellius simply indicates that the curies were a division of citizens based upon the original nationalities (*ex generibus hominum*), the three tribes of Ramnenses, Tatienses, and Luceres, having each been divided into ten curies; whereas in assemblies formed at a more recent period the principle of classification was entirely different. This construction is more in harmony with the concluding words of Aulus Gellius.²

Be the correct interpretation what it may, the passage is none the less characteristic, and should be retained as the ancient formula for the assembly of curies. “*Cum ex generibus hominum suffragium feratur, curiata comitia esse.*” Whether

fuit principium,” or rather *Fauciæ curiæ fuit principium*, according to the formula which we find in the text of a plebiscitum given by Fronto (*De aquæductis*, § 129). The lot had fallen to this Faucian curia to be first in two calamitous years, that of the capture of Rome and of the Claudine forts (*utroque anno eadem curia fuerat principium*). And so it was considered a bad omen, and when, in the circumstance of which Livy speaks, the name of the *curia* twice came first the assem-

bly was dissolved and adjourned to another day.

¹ Lib. i. § 43.

² Aul. Gell. lib. xv. ch. 27: “Item in eodem libro (Lælii Felicis) hoc scriptum est: ‘Cum ex generibus hominum suffragium feratur, *curiata comitia* esse; cum ex censu et ætate, *centuriata*; cum ex regionibus et locis, *tributa*.’” We do not render *ex generibus* as if it were *ex gentibus*; we translate it in its literal sense; when the votes were taken according to race or origin.

the electors were grouped in *gens*, or whether they voted separately (*viritim*), this much is clear, that the patricians controlled the plebeians by whom they were surrounded, and who by the ties of clientage were bound to give them their support.

31. It is precisely because the thirty curies were constituted upon a principle based upon the threefold origin of the ancient nationalities, the Latins, Sabines and Etruscans (*ex generibus hominum*), that it was destined to prove insufficient, and even an absurdity, the moment that so many other nationalities were admitted to and amalgamated with the Roman *populus*. The curies were thus soon to disappear in order to make room for other organizations more conformable to the exigencies of the period. However, long after they had ceased to exist in their original constitution, they were maintained for the administration of affairs of religion and for the investiture of the *imperium* by the *lex curiata*, when thirty lictors, symbolizing the thirty curies by a legal fiction, confirmed their authority.¹

SECTION V.

THE SENATE (*Senatus*).

32. The senate was an institution common to the cities of antiquity, whether Greek or Italian. The chiefs of the patrician caste constituted the senators. This title, an indication of the matured experience of age, was adopted by the Romans, according to Cicero, in imitation of the Greeks, who designated the members of the civic council, elders (*γέροντες*).² We have already seen that they were also styled *patres*, as expressing their patrician privileges; and Florus says of them, "Qui ex auctoritate Patres, ob ætatem Senatus vocabantur."³

¹ Cicero, *Agrar.* ii. §§ 11 and 12: "Curiata (comitia) tantum auspiciorum causa remanserunt." "Illis (comitiis), ad speciem atque ad usurpationem vetustatis, per XXX lictores, auspiciorum causa, adumbratis."

² Cicero, *De republica*, lib. ii. § 28:

"Lycurgus Λυργῆς Lacedæmone appellavit. . . quos penes summam consilii voluit esse, quum imperii summam rex teneret: ex quo nostri idem illud secuti atque interpretati, quos *senes* ille appellavit, nominarunt *senatum*."

³ Vide supra, § 19.

33. Roman tradition differs as to the number of the senators in primitive times. Nor are the historians Livy, Cicero, Dionysius of Halicarnassus, Plutarch and others agreed as to the original number or subsequent additions. All, however, concur in this, that at the close of the reign of Tarquinius Priscus the strength was three hundred. This number remained unaltered till the latter end of the republic, when it was doubled or tripled according to the turbulent character of the times and the rivalry of ambitious partisans.

The peculiarity of the number three hundred suggests the supposition that in early times each of the three distinct nationalities, forming the three tribes, was represented in the senate by an equal number of senators, namely, one hundred. One of the popular traditions adopted by Plutarch and Dionysius supports this theory, that is to say, in connection with the Sabines, while Cicero tells us that each of the three nationalities was represented by fifty senators till the time of L. Tarquinius (Priscus), who doubled their number, thus making the total three hundred; and that the original senators and their successors were styled *Patres majorum gentium*, while those created by Tarquin and their successors were known as *Patres minorum gentium*.¹

When at a later period the plebeians were admitted to the senate, they did not receive the rank of *Patres*, which was confined to the patrician race, but were called *Conscripti* or *Adlecti*, i. e., inscribed in the number of senators, whence the expression "*Patres et conscripti*," or in its contracted form *Patres conscripti*.²

¹ Cicero, *De republica*, lib. ii. § 20: "Principio duplicavit (L. Tarquinius) illum pristinum patrum numerum; et antiquos patres majorum gentium appellavit, quos priores sententiam rogabat; a se adscitos, minorum." Livy, lib. iv. § 35, says the same in fixing on one hundred, the number of the new senators made by L. Tarquin: "Centum in patres legit; qui deinde minorum gentium sunt appellati."

² Festus, on the word *Adlecti*: "Adlecti dicebantur apud Romanos, qui propter inopiam (patriciorum) ex equestri ordine in senatorum sunt numero

adsumpti: nam *Patres* dicuntur qui sunt patricii generis; *Conscripti*, qui in senatu sunt scriptis adnotati." And on the word *Conscripti*: "Conscripti dicebantur qui ex equestri ordine patribus adscribebantur, ut numerus senatorum expleretur." And on the words *Qui Patres*: "Qui *Patres*, qui *Conscripti* vocati sunt in curiam, quo tempore regibus urbe expulsis, P. Valerius consul (Publicola, in concert with his colleague Brutus), propter inopiam patriciorum ex plebe adlegit in numerum senatorum centum et sexaginta et quatuor, ut expleret numerum senatorum trecento-

The three hundred senators were divided into decuries, that is, were divided by tens; consequently there were thirty senatorial decuries, or the same number as there were of curies, which gives rise to the conjecture that each *curia* furnished a senatorial *decuria*. However, these numerical coincidences are not to be relied upon.

34. Setting aside Romulus and his immediate successors, together with the transactions imputed to them, it has long been a subject of discussion whether under the principles of the constitution the senators were present at the nomination of the kings, or at the election of curies. With the exception of a passage from Dionysius, Roman historians concur in believing that they were present at the election of kings, which is confirmed by the practice under the republic after the expulsion of the kings.¹

35. The senate is styled by Cicero the Royal Council (*regium consilium*).² It deliberated upon public matters, and upon propositions to be submitted to the people in the curies. Being an aristocratic assembly, its tendency was to make tools of those entrusted with the government. As the ward can only act with the authority of his guardian, so the king reigned only by the counsel and with the authority of the senate. Cicero says, even of Romulus himself, the traditional founder of Rome, "*Multo etiam magis Romulus Patrum auctoritate consilioque regnavit.*"³

rum, et duo genera appellata sunt." Livy, lib. ii. § 1: "Cædibus regis diminutum patrum numerum, primoribus equestribus gradus lectis, ad trecentorum summam explevit (Brutus); traditumque inde fertur, ut in Senatum vocarentur, qui *Patres*, quique *Conscripti* essent. *Conscriptos* videlicet in novum senatum appellabant lectos."

¹ Festus, on the word *Præteriti*: "Præteriti senatores quondam in opprobrio non erant, quod, ut reges sibi legebant sublegebantque quos in consilio publico habent, ita, post exactos

eos, consules quoque, et tribuni militum consulari potestate, conjunctissimos sibi quosque patriciorum et deinde plebeiorum legebant; donec Ovinia tribunitia intervenit, qua sanctum est, ut censores ex omni ordine optimum quemque curiatim senatu legerent. Quo factum est, ut qui præteriti essent, et loco moti, haberentur ignominiosi."

² Cicero, *De republica*, lib. ii. § 8.

³ Cicero, *De republica*, lib. ii. § 8: "Multo etiam magis Romulus Patrum auctoritate consilioque regnavit."

SECTION VI.

THE KING (*Rex*).

36. The king is the ruler (*rex*), the administrator of an aristocratic republic. The curies subordinate to the patrician caste nominate him, and after the confirmation of the election by the *auctoritas* of the senate, confer upon him by the *lex curiata* the investiture of power. The senate counsels, assists and supports him; his functions are military,* sacred and judicial; he is at once commander in chief, high priest and superior magistrate; his lot must be cast with the patricians or with the plebeians; he must either submit himself to the patrician and senatorial will, or he must seek in popular favour and plebeian support the means to resist their influence. The regal annals, however, present us with a brighter picture, and invest the king with a much larger share of authority, making him the founder of institutions, the creator of senators, the dispenser of landed estates and the spoils of war, and the great lawgiver. And doubtless he was such in the manner described in the quotation from Pomponius, and referred to in the next paragraph, inasmuch as he proposed laws to the senate.



SECTION VII.

THE ORIGINAL ELEMENTS OF PRIVATE CIVIL LAW.

37. It is to Romulus himself that the Roman historian and jurist attributes the publication of positive law upon marital and paternal power; that is to say, upon the composition of the Roman family.¹ Without reference to laws that are said to have been written, but which are unknown to us and are possibly as fabulous as the times to which they relate, we may

¹ Dion. lib. ii. §§ 26 and 27. Digest, 1, 2, *De origine juris*, 2, § 2, fragment of Pomponius: "Ipsū Romulū traditur populum in triginta partes divisisse, quas partes *Curias* appellavit: propterea quod tunc reipublicæ curam per sententiam partium earum expediebat; et ita *Leges* quasdam et ipse *curi-*

atas ad populum tulit." This *lex Regia*, of which Papinian speaks in the following terms, is cited as a law of Romulus: "Quum patri lex Regia dederit in filium vitæ necisque potestatem." (*Collatio legum Mosaicarum et Romanarum*, tit. 4, § 8.)

perhaps find in the military tendencies and the rude manners of the age, and particularly in the city of Rome itself, sufficient to afford a fair idea of the primitive elements of Quiritarian private law.¹ The family, like the state, began with slavery. The Romans were the "Quirites," the men of the lance. By the lance they acquired their territory, their property, their companions, and, if we may credit their poets, even their wives. With them the lance became the symbol of property, and even had a place in their judicial procedure. Their slaves were booty, their wives were booty, and their children, begotten of them, the fruit of their possession. Such being the case, we are prepared to find, running all through the popular traditions of their origin, the rule that the head of the family, the *pater familias*, had over his slaves, his wife and his children, not a power such as is known to us, but the most full and complete rights of property; the power of life and death over slaves, the power of condemnation over wife and children, and the right to sell the latter or to abandon and expose them, more particularly when deformed. As a historical fact, this right of property and licence to abandon children was common to almost all the nations of Italy, if not to the full extent possessed by the Romans, at least it existed in principle.

Though it may appear that the existence of such institutions at the birth of Rome is of but little importance to us, it must not be forgotten that they formed the basis of the civil law both public and private, nor should we fail to find traces of their impress throughout the entire extent of their legislation. These are, however, but the germs, and to attribute to them at this epoch the development of their riper growth would be an anachronism.

38. B.C. 715. The poetic traditions of the Romans, after having related the fate of Romulus, how he was borne to heaven and placed in the rank of the gods, go on to tell us how, after an interregnum of a year, during which certain senators, for a period of five days each, alternately exercised the regal power,

¹ Also Ulpian, "Nam quum jus potestatis moribus sit receptum." (Dig. 1, 6, *De his qui sui*, etc., 8, f. Ulp.)

the people assembled by curies and called a Sabine of the name of Numa Pompilius to the throne. They represent this king as pacific as his predecessor was warlike, devoting his attention to humanizing the barbarous manners of the Romans, favouring the cultivation of land, and developing the principles of sacred law. For it is to him that the greater part of the religious institutions of Rome are ascribed.

SECTION VIII.

RELIGIOUS INSTITUTIONS (*Sacra publica, Sacra privata*).

39. It is of more importance than is generally supposed to examine the character assumed by the state religion of the Romans, even from its birth, for religion was closely bound up with public law and all state matters.

The indigenous deities of the Italian nation are to a great extent blended with the Greek divinities, and not unfrequently assume their names. The practice of human sacrifice, common to these nations, existed from the earliest ages of Rome, and continued till after the expulsion of the kings, leaving for a long time traces in the shape of a sacred formula impressed upon its legal system: *sacer esto*.¹ We are able to gather from certain *jeux des mots*, that tradition both attributes to Hercules in the fabulous ages, and to the Consul Junius Brutus at the time of the Roman republic, the credit of having dissuaded or prohibited the Romans from the practice of human sacrifices. Hercules is said to have induced the Italian nations to offer to Saturn the sacrifice of lighted torches in lieu of that of human beings, the word *phœra* of the oracle signifying at the same time men and torches; Junius Brutus, who put an end to the practice of immolating infants to the gods Lares and Manes, still practised at the (*compitalia*) fêtes, ordered in their stead an offering of garlic or poppy heads, because the oracle had said, "Intercede for heads with heads."² Nevertheless certain human

¹ Vide supra, § 16.

² Macrobius, *Saturnalia*, ch. 7: "Ut

pro capitibus, capitibus supplicaretur."

This *jeu de mots* is attributed to Her-

sacrifices, upon the occasion of great national calamities, more than once occur in Roman history even in much later times.¹

It was chiefly from an Etruscan source that the Romans derived their science and the greater part of their religious practices. The Etruscans no doubt possessed a ritual, the same probably as that which the *lucumons* pretended to have written down from the dictation of the miraculous *Tages*. And we can gather from an enumeration of rites and practices made by *Festus*, and adapted to the Roman institutions, all that the ritual contained relative to public law.² The jurist *Labeo* wrote a commentary upon it in fifteen volumes, which is now lost.

The sacerdotal functions were for the most part considered by the Romans, the Etruscans, and the other Italian nations, as civil charges and a privilege of the patrician caste. Under no obligation to lay aside the ordinary habits of society, the priest, like any other citizen, was free to marry, and in general at liberty to aspire to any dignity in the state, being at the same time bound by almost all public obligations. These priests formed colleges, of which the king was chief. No important enterprise was ever undertaken without first offering up a sacrifice to the gods and without consulting the oracles; and not unfrequently the validity of a public act, its continuance or its repeal, was made to depend on a sacerdotal determination. The especial province of the augurs, whose history it will be our duty to trace, consisted in presaging the result of a suggested enterprise by the means of celestial phenomena, observations upon the entrails of the sacrificial victims, attention to the flight, the song or the appetite of birds. Divers Italian communities were renowned for their skill in one or more of these modes of divination, and it was from them that the Romans acquired their knowledge. The Umbrians, for example, were

cules, and from the offerings made to Saturn in place of human sacrifices came the custom of sending wax tapers at the *Saturnalia*. We see that our custom of presenting tapers, before the Revolution, among certain classes, had an ancient origin.

¹ *Livy*, lib. xxii. § 57.

² *Festus*, on the word *Rituales*:

"*Rituales nominantur Etruscorum libri, in quibus præscriptum est, quo ritu condantur urbes, aræ, ædes sacrentur, qua sanctitate muri, quo jure portæ, quomodo tribus, curiæ, centuriæ distribuuntur, exercitus constituentur, ordinentur, cæteraque ejus modi ad bellum ac pacem pertinentia.*"

famed for their prophecies based upon the motions of birds; while the Etruscans paid especial attention to omens from lightning, celestial phenomena and prodigies; and such was the importance attached to the acquisition of this knowledge that the Roman senate decreed that six children belonging to the first patrician families should be confided one to each of the different communities of Etruria, that they might be brought up in the mysteries of this art.¹

The *sacra publica* were those sacrifices and rites which were performed in the name and at the expense of the city, and which were religious ceremonies, varying with the occasion, the divinity, and the time.²

40. Every important act of a Roman, whether public or private, assumed a religious character: hence their implicit reliance on an oath, their respect for things sacred, their veneration for the tomb, the worship of their lares and domestic deities: a worship which, together with the religious obligations it entailed (*sacra privata*), was, according to the account given by Cicero in his treatise on the laws, transmitted from generation to generation as an indestructible and necessary part of the inheritance. “Ritus familiæ patrumque servanto; sacra privata perpetuo monento.”³

We not unfrequently find in the Roman writers mention made of certain vestiges of *sacra privata* peculiar to the *gentes*

¹ Cicero, *De divinatione*, lib. i. § 41.

² Festus, on the word *Publica*: “Publica sacra, quæ publico sumptu, pro populo fiunt, quæque pro montibus, pagis, curiis, sacellis; at privata, quæ pro singulis hominibus, familiis, gentibus fiunt.” And on the word *Popularia*: “Popularia sacra sunt, ut ait Labeo, quæ omnes cives faciunt, nec certis familiis adtributa sunt: Fornacalia, Parilia, Laralia, Porca præci-dania.”

³ Cicero, *De legib.* lib. ii. § 9. See how, in his treatise on the Republic, he speaks of the religious laws of Numa, adding that they still preserved them in existing monuments, and giving them the credit of originating sacrifices of an inexpensive character: “Idemque Pom-

pilius et auspiciis majoribus inventis, ad pristinum numerum duo augures addidit; et sacris e principum numero pontifices quinque præfecit; et animos, propositis legibus his quas in monumentis habemus, ardentis consuetudine et cupiditate bellandi, religionum cæremoniis mitigavit; adjunxitque præterea flamines, salios, virginesque vestales; omnesque partes religionis statuit sanctissime. Sacrorum autem ipsorum diligentiam difficilem, apparatus perfacilem esse voluit. Nam quæ perdiscenda, quæque observanda essent multa constituit, sed ea sine impensa. Sic religionibus colendis operam addidit, sumptum removit.” (*De republica*, lib. ii. § 14.)

of an illustrious house, for example, that of Claudia, Horatia, Fabia, Nautia, and others."¹



SECTION IX.

THE CALENDAR: DAYS—*Fasti* OR *Nefasti*.

41. It was the duty of the pontiffs to regulate the calendar. In order to obviate inconvenience it is necessary that the year should involve the same time precisely that is occupied by the earth in its circuit round the sun. Such being the case, times and seasons correspond; the earth and the year run and terminate their course together. The early Italian year was far from presenting this harmony. We are told by Censorinus that it was no uncommon thing for the different Italian nations, and especially the Ferentini, the Lavinians and the Albans, to have years peculiar to themselves and differing from each other. Under these circumstances it is obvious that irregularities were of constant occurrence. These they adjusted, however, as best they could, relying upon their familiarity with the courses of the heavenly bodies, by the intercalation from time to time of the period necessary to equalize their artificial with the solar year.² The Romans, according to the authorities cited by Censorinus, amongst whom is Varro, at first adopted the year in use with the Albans.³ This year was based upon lunar revolutions, and consisted of ten months, the first being March, the last December. These ten months only contained three hundred and four days, and as the time occupied by the earth in its revolution round the sun is three hundred and sixty-five days and a quarter, the month of March, with which the year commenced, recurred before the earth had accomplished its

¹ See specially Festus, on the words *Propudianus*, *Porcus* and *Saturno*. Livy, lib. i. § 26, and lib. v. § 46.

² Censorinus, *De die natali*, § 20: "Nam, ut alium Ferentini, alium Lavinii, itemque Albani vel Romani habuerunt annum: ita et aliæ gentes. Omnibus tamen fuit propositum suos civiles annos, varie intercalandis men-

sibus, ad unum verum illum naturalemque corrigere."

³ Censorinus, *De die natali*, § 20: "Sed magis Junio Gracchano, et Fulvio, et Varroni, et Suetonio, aliisque credendum, qui decem mensium putaverant fuisse: ut tunc Albanis erat, unde orti Romani."

revolution, or the four seasons had marked their course. Consequently at one time it was in winter, at another in the summer, each month being correspondingly displaced. This want of harmony between the months and the seasons could not fail to bring about visible confusion, and consequently the Romans, like the other Italian nations, had from time to time recourse to intercalation.

The first correction is attributed to Numa, who is said to have added to the ten months, then existing, two others, January and February, the one at the commencement, the other at the end of the year. These twelve months, however, only contain 354 days, or, according to some, 355. The difference then still existing between the Roman and Solar year was from ten to eleven days, and it was the duty of the pontiffs to keep this discrepancy obviated by periodic intercalation. But upon what principle this was done is far from clear. Plutarch says that Numa decreed that a month, consisting of twenty-two or twenty-three days, should be alternately intercalated every second year; but as this method did not exactly meet the difficulty, it appears to have been abandoned by the pontiffs, who made what arbitrary additions they thought fit.¹ The uncertainty and irregularity occasioned by these arbitrary intercalations, made at the caprice of the pontiffs, is a constant source of bitter complaint on the part of the historian.²

42. These calculations were intimately connected both with public and private law; the duration of magistracies, the classification of feast days, the celebration of public or private ceremonies in honour of the domestic deities, fixed and moveable holy days, the *dies comitiales*, upon which the *comitia* could be held,³ and those upon which it could not, and especially that

¹ Censorinus, *De die natali*, § 20: "Quod delictum (the inequality between the solar and the civil year) ut corrigetur, pontificibus datum est negotium, eorumque arbitrio intercalandi ratio permissa." See also Macrobius, *Sat.*, lib. i. ch. 18, who explains why they had recourse to this method.

² Censorinus, *De die natali*, § 20: "Sed horum plerique, ob odium vel

gratiam, quo quis magistratu citius abiret, diutiusve fungeretur, aut publici redemptor ex anni magnitudine in lucro damnove esset, plus minusve ex libidine intercalando, rem sibi ad corrigendum mandatam, ultro depravarunt."

³ Macrobius, *Saturnal.*, lib. i. ch. 16: "Comitiales sunt, quibus cum populo agi licet."

which was all important to the jurist, the days upon which the magistrate could exercise his functions, when he was permitted to pronounce the sacred words "DO, DICO, ADDICO;" in which are summed up the various acts of his jurisdiction, and from which came the expression *dies fastus* (*de fari licet*) and *dies nefastus* (*de fari non licet*).¹ All these depended upon the termination of the year, and were regulated by the calendar. The result of this was, to place all these functions within the direction and under the control of the pontiff, whence they and the patrician class, of which they were members, acquired immense influence, both in public and private matters.

The fact of a day being "fastus" or "nefastus" was a matter of the utmost importance to the Romans in relation to their private affairs.

The solemn procedure, consisting of what were styled the *legis actiones*, was confined to the "dies fasti," not merely as to the conduct of law suits, but also as to a number of voluntary transactions of a private nature between consenting parties; as, for example, alienations, the commencement or termination of servitudes, enfranchisement, emancipation and adoption, which were accomplished by means of feigned actions. Certain days were "nefasti" in the morning and evening, while during the day time, that is, between the immolation of the victim and the sacrifice, they were "fasti;" such days were termed "intercisi."² Books giving a list of the days in the year, showing which were "fasti," were termed "Fastorum libri."³ Ovid has devoted a poem to the subject, in which he says, addressing Germanicus, "You will find the public feast days and those dedicated to your domestic worship," viz., the day upon which it was not

¹ Varro, *De lingua latina*, lib. vi. § 29: "Dies fasti, per quos prætoribus omnia verba sine piaculo licet fari." § 30: "Dies nefasti, per quos dies nefas fari prætorem: DO, DICO, ADDICO; itaque non potest agi; necesse enim aliquo eorum uti verbo, cum lege quid peragitur." And further, § 53: "Hinc fasti dies quibus verba certa legitima sine piaculo prætoribus licet fari. Ab hoc nefasti quibus diebus ea fari jus non est, et si fasti sunt, piaculum faciunt."

² Varro, *De lingua latina*, lib. vi. § 31: "Intercisi dies sunt per quos mane et vesperi est nefas medio tempore inter hostiam cæsam et exta porrecta fas." Reference must be made to Macrobius, *Saturnalia*, lib. i. ch. 16, for a definition of the different days and of several other matters, and also for an account of the relation which these days bore to the dies *festi* and *profesti*.

³ Festus, on the word *Fastorum*: "Fastorum libri appellantur, in quibus totius anni fit descriptio."

lawful to pronounce the three words, and those upon which it was lawful to take legal proceedings.¹ In the time of Ovid, the arrangement and the character assigned to each day of the year had been in vogue for almost three centuries, and were universally known; but in the commencement and for a very considerable period of the republic, the knowledge was confined to the pontiffs and the patricians.

43. With the view of having a visible symbol of the calculation of time, a custom which had long existed among the Etruscans and had been adopted by the Romans was confirmed by an ancient law. This custom was that the chief magistrate should, upon a certain day in each year, drive a large nail into the wall of the Temple of Jupiter at Rome. This was also held, in the superstition of the people, to be an expiatory solemnity for epidemics, public calamities and great crimes.²

44. After Numa an interval of more than ninety years is occupied, according to the Roman narrative, by the three reigns of Tullus Hostilius, B.C. 673; Ancus Martius, B.C. 641; and Tarquinius Priscus, B.C. 616.

SECTION X.

THE ELECTION OF KINGS, FROM CICERO'S DE REPUBLICA— “*Lex regia.*”

45. In his treatise on the Republic Cicero brings to our notice several points of interest, in connection with the election of kings, well worth attention. He never fails to repeat, concerning Tatius, Ancus, Tarquin, and Servius, what he says

¹ Ovid, *Fasti*, lib. i. line 7 et seq. :—

Sacra recognoscens Annalibus eruta priscis;
Et quo sit merito queque notata dies.
Invenies illic et festa domestica vobis.

Lines 47 and 48 :—

Ille nefastus erit per quem tria verba silentur:
Fastus erit, per quem lege licet agi.

Line 53 :—

Est quoque, quo populum jus est includere septis.

² Festus, on the word *Clavus*: “*Clavus annalis appellabatur, qui flegebatur in parietibus sacrarum ædium per annos singulos, ut per eos numerus colligeretur annorum.*” See Livy, lib. vii. § 3, and lib. vii. § 18.

about Numa, "*quamquam populus curiatis eum comitiis regem esse jusserat, tamen ipse de suo imperio curiatam legem tulit.*"¹ The sentence recurs in each new reign with such regularity and identity of expression that it may be reasonably concluded that he was deriving his information from some public legal document. This explains the origin and nature of that "*lex curiata*" which continued in force to the latest days of the republic, in order to give the magistrates, after their election, the investiture of the "*imperium.*" This practice commenced with the age of the kings. When the curies had elected the king, when the senate had given its "*auctoritas*" to their election, the "*lex curiata*" was then passed in order that the king might be invested with the "*imperium.*"²

Such was, we think, without doubt, the "*lex regia,*" the term applied to the investiture of the emperor—a name which survived republican hatred to royalty and which was preserved during the empire.

SECTION XI.

INTERNATIONAL LAW—COLLEGE OF THE FECIALES.

46. During the three reigns to which we have just referred the spirit of conquest recovered its original energy, and the territory and inhabitants of Rome were augmented from the territories and inhabitants of neighbouring states. The Roman historians ascribe some to Numa, others to Tullus Hostilius or Ancus Martius, an institution connected with international law, the college of the *Feciales*. The fact is that this was an institution common to the different Italian nations, and that the Romans only followed the prevailing custom. Various writers inform us that it existed with the Albans, the Samnites, the Ardeans, the Falisci of Etruria and the Equicoli.³ Varro and Festus assign very equivocal etymologies to the word *Feciales*.⁴ Cicero, in his treatise "*De legibus,*" summarises

¹ Cicero, *De republ.*, lib. ii. §§ 13, 17, 18, 20 and 21.

² Vide supra, § 27.

³ Livy, lib. i. §§ 24, 32; lib. viii.

§ 39. Dion. lib. ii. § 73. Servius, *Ad Æneid.*, lib. x. l. 14.

⁴ Varro, *De lingua latina*, lib. 5, § 86: "*Feciales quod fidei publicæ*

In the course of time, it is true, although the outward form remained the substance had disappeared. A small field near the temple of Bellona, within sight of the extremity of the Circus, was consecrated as the *campus hostis*. It is here that the *fecialis*, to avoid the loss of valuable time made by undertaking a long journey, went to announce his declaration of war, and at the foot of a little column, of which Ovid speaks in his *Fasti*, he hurled his javelin to the ground.¹

47. It is to the time of Ancus Martius that Niebuhr ascribes the origin of the plebeians; and upon the faith of a correction in a manuscript verse of Catullus, which has evidently been altered,² he concludes that the plebeians were the followers of Ancus, while the patricians, with their clients, were those of Romulus. It is true that the history recognized by the Romans describes Ancus Martius as greatly swelling the population of Rome, by transporting thither after their defeat several thousand Latins to whom the right of citizenship was awarded. But Ancus, in so doing, only followed the example of others besides the Romans, whose invariable policy during their early history, as we see in Dionysius of Halicarnassus,³ was, that these strangers, upon whom the rights of citizenship were conferred, were distributed among the various curies. It is, however, true that these new citizens, by whom the Roman population was from time to time augmented, not being all, as were the primitive inhabitants, attached to patrician *gentes* by the ties of clientage, occupied a somewhat different position, as has already been explained.⁴ The observations of Niebuhr must be confined to this point.

48. According to tradition, Ancus enlarged the city, which he fortified by an entrenchment on the Janiculum, and by the

¹ Ovid, *Fasti*, lib. 6, l. 205 et seq.:—

Prospectit a templo summum brevis area circum
Est tibi non parvæ parva columna notæ.
Hinc solet hasta manu, belli prænuntia, mitti,
In regem et gentes quum placet arma capi.

² Catullus, Ode 34 to Diana. The generally received reading is—

Sis quocunque placet tibi
Sancta nomina Romulique

Antiquam, ut solita es, bona
Sospites ope gentem.

The MS. has *Antique*. Niebuhr adopts the reading indicated by Scaliger, *Romulique Ancique*, the race of Romulus and Ancus. Admitting this, we are far from the deduction derived from it.

³ Lib. iii. § 50.

⁴ Vidé supra, § 16.

assumed at Rome the name of Tarquinius Priscus,¹ appears to have commenced an attack upon the primitive institutions based upon the distinctions of the original nationalities, Ramnenses, Tatienses, Luceres, and against the narrow oligarchy of the ancient patrician families; an attack which his successor Servius Tullius pushed still further, and which, at a later period, was taken up and driven to very different results by the plebeians. The moment had come when the primitive frame in which the citizens were divided into tribes and curies according to their origin, Ramnenses, Tatienses, or Luceres, no longer sufficed for the wants of the new citizens who belonged to neither of these, but by whom Rome had been successively recruited, and who now formed a rapidly increasing population.

Many of these new comers had, in their own cities, been members of the dominant class; but when they arrived in Rome they had been—with the exception of a very few who, with the rights of citizenship, received those of the patriciate—placed in the ranks of plebeians. Here, owing to their hereditary franchise, they were in a position to form the stock of the plebeian “*gentes*,” in opposition to the original principle on which the patricians alone could form a “*gens*.” Tarquin himself belonged to the number of the new citizens, and many of his friends and partisans who had accompanied him, and who had been admitted with him to the rights of citizenship, and had been distributed amongst the tribes and the curies,² found themselves in the position we have just described.

51. Lucius Tarquinius was unable to accomplish all that he desired by way of reformation. When he attempted to abolish the names of the tribes, Ramnenses, Tatienses and Luceres, as being inconsistent with the new elements of the population, he encountered a formidable opposition, under the colour of religion, in the person of Attius Navius the augur, and he was compelled

¹ The true meaning of the word *Priscus* applied to Tarquin has long been questioned. Livy makes it a surname: “*Urbem ingressi sunt domicilioque ibi comparato, L. Tarquinium Priscum edidire nomen.*” Livy, i. § 34. Paul, following Festus, considers it an

epithet: “*Priscus Tarquinius est dictus, quia prius fuit quam superbus Tarquinius*” (on the word *Priscus*). Dionysius of Halicarnassus is of the same opinion, lib. iv. § 48.

² Dion. lib. iii. § 71.

to renounce his design.¹ It was reserved to his successor to succeed in this object in another way. Nevertheless, he elevated about a hundred or a hundred and fifty persons to the patriciate (historians differ as to the number), and gave them a place in the senate; and as the pride of the ancient patricians refused to admit them upon terms of perfect equality, they became the foundation of those "*minores gentes*" who, from generation to generation, remained distinct from the "*gentes majores*," whose stock and nobility were coeval with the foundation of Rome.²

52. Among the numerous monuments and works of art constructed in the time of L. Tarquin, when the future grandeur of the eternal city began to dawn upon the world, which is still shown at Rome, was the "Cloaca Maxima." This great and useful work, by which the marshes were drained, the atmosphere purified, and large tracts of land reclaimed for the city, was commenced by L. Tarquinius and completed by Tarquinius Superbus. It is in the Etruscan style of architecture, and has withstood the destructive influence of time and neglect. There the imagination of the poet can contemplate, in the creation of a Cyclopean or Pelasgic age, the mysterious vestiges of an unknown civilization.

53. B.C. 578. Servius Tullius was indebted to a subterfuge for his elevation to the throne. This prize he secured without pledging himself to the patrician party (*non commisit se patribus*), and was the first who became king without the preliminary election by the senate or the sanction of the curies, although after he had mounted the throne he solicited nomination and the investiture of the "*imperium*" by the *lex curiata*.³ In doing this, he aimed a fatal blow at the ancient system of distribution into tribes, based upon their primitive origin. This distribution had become utterly inconsistent with the new and now considerable population of Rome. And if he suffered the "*comitia curiata*," which was constructed upon that narrow principle, still to exist, it was merely from respect to the

¹ Vide supra, § 21.

² Vide supra, § 33.

³ Cic., *De republica*, lib. ii. § 21.

auspices and certain old forms of primitive law. The assemblies he created were for the discharge of real business, and were framed upon a different system, every citizen being eligible.

According to the first census taken by Servius Tullius, the population of Rome at that time consisted of upwards of 80,000, and this shows the extent to which the representatives of the three original tribes, the Ramnenses, Tatienses and Luceres, must have found themselves outnumbered. Servius himself, whether we accept the fables about his extraction, or adopt the Etruscan annals which represent him as the chief of an Etruscan band, belonged, together with all his followers, to the new comers.

The friend and counsellor of Tarquin, his predecessor, he carried out his labours to completion. The radical reform which he introduced in the political constitution of Rome was to place side by side with an aristocracy of race the superior caste of the ancient patrician order, an aristocracy of wealth, whose ranks were open to all. Thus it was that many of the new citizens attained a position of influence, in spite of the rank they or their ancestors had enjoyed in their native country, and who, whatever might have been their wealth, had hitherto at Rome been denied admission into the patrician order, and had been ranked with the plebeians.

54. Heretofore the revenue had been raised by means of a poll tax (*viritim*), arbitrarily imposed without any fixed principle or any adequate proportion between the rich and poor. The division of the people into tribes and curies had been, as we have seen, based upon their origin, and the assembly so founded (*comitia curiata*) voted "*ex generibus*." And, notwithstanding our ignorance of details, we know that the supremacy remained in the hands of the ancient patrician order. It was for Servius to substitute for this division and consequent vote, depending upon caste, a distribution of the people and a system of voting regulated by wealth; in short, he proportioned the taxation and the suffrage of each citizen to the amount of his property.

The institution of the census, the distribution of the people into classes and centuries, the assembly of the centuries, the origin and progress of the order of knights, and the organization of tribes according to locality, here demand our attention.

SECTION XII.

THE CENSUS.

55. The head of each family was obliged to make a written statement, upon oath, of the number of persons composing his family, of his property of every description, and its fair estimated value, under penalty of confiscation of any article omitted.¹ As soon as this was finished the entire *populus* passed in review through the Campus Martius and underwent the ceremony of purification (*populum lustrare*). This ceremony was repeated every fifth year; hence the term *lustrum* was used to signify a period of five years. This table or register was called the "census," and, as a new chapter (*caput*) was opened for each head of a family, the condition of the population and the respective fortunes of families could be periodically ascertained.

Enrolment by name in the census was a privilege confined to citizens; the names of sons were doubtless inscribed in the chapter dedicated to their father; women, and males under sixteen years of age, who had not exchanged the *prætexta* for the *toga*, were only enumerated; slaves were indicated simply by numbers amongst the chattels of their masters, and in the course of time the ceremony of enfranchisement consisted simply in inscribing their name in this table.

SECTION XIII.

THE CLASSES (*Classes*) AND THE CENTURIES (*Centuriæ*).

56. From the institution of the census, which had determined the amount of the fortune of each citizen, was derived the distribution of the people into classes and centuries, based mainly

¹ Dion. lib. 4, § 16.

upon the amount of their wealth. This distribution was regulated so as to provide for the three social necessities, taxation, military service, and the franchise. The classes and the centuries therefore formed an organization for the purposes of revenue, war, and legislation. This assimilation must not, however, be pushed too far, and certain clearly defined lines of demarcation must be preserved between these three distinct objects. Sons, who at this period could not hold property, were only placed in the classes under the census of their father, and consequently only contributed to the revenue in the person of their father. Although, in military matters, their individuality was recognized, and they had the right of personal voting in the comitia.

57. The division of classes as to matters of taxation was exclusively regulated by the amount of property. These classes were five in number, for those whose income was below a certain sum, not being liable to taxation under the rule laid down by Servius, were not considered as belonging to any class.¹ Historians differ as to the pecuniary qualification necessary for each class, and it is exceedingly difficult for us to form a correct estimate relatively with our own times.² These classes were taxed differently, and state burdens must therefore have fallen upon each in a manner proportioned to his means. It is not difficult to understand with what feelings the exemption accorded to them by Servius was received by the numerous class of poor plebeians. So dear was his memory to them, that for long after the expulsion of the kings, tradition having fixed his birth in the "nones," without specifying which, the plebeians celebrated them all; and fearing lest if these fêtes should happen to fall on a market-day, when the concourse of people being great, some revolutionary measures might be taken in memory of this king,

¹ This is as the matter was understood by the Romans, and stated by Cicero and Livy. Dionysius makes six, because he reckons as a class all those who were exempt from taxation.

² According to Livy, lib. i. § 43, the property qualification was as follows:—
1st class consisted of citizens who possessed .. 100,000 asses.

2nd class	..	..	75,000 asses.
3rd "	..	..	50,000 "
4th "	..	..	25,000 "
5th class	..	..	11,000 "

Or, according to Dionysius, 12,500, the half of the amount required for the class No. 4. Those whose income did not reach this amount were not classified and were free from taxation.

from them any contingent other than that of their children. However, upon closer examination, we find certain limitations; those citizens, for example, whose fortune was below the amount necessary to place them in the fifth class, yet possessed more than 1,500 asses, would be the "accensi" or "velati;" those whose fortune ranged between 1,500 and 375 asses were the "proletarii" properly so called; the remainder simply appearing upon the census by name were termed "capite censi."¹ In cases of extreme urgency, the *proletarii* might be armed and equipped at the public expense; but it was not till the time of Marius, in the wars against the Cimbri and against Jugurtha, that we find the "capite censi" admitted into the army.

60. In order clearly to understand the division into centuries, its double object, military and electoral, must be kept in view.

The word "*centuria*" has a military origin, and most probably originally signified a troop of 100 men, though at a later period it had no reference to number.² In the military aspect centuries existed amongst the old Italian nations; thus the Etruscan rituals indicate the ceremony attending the distribution into the centuries of which the army was composed,³ and centuries existed at Rome before those introduced by Servius Tullius. Thus the tribes, the Ramnenses, Tatienses and Luceres, each originally furnished a hundred cavalry, in all three hundred, recruited from amongst the patricians. The creation of these centuries is attributed to Romulus, and L.

¹ Cicero, *De republica*, ii. § 22: "Quum locupletes *assiduos* appellasset ab ære dando; eos qui aut non plus mille quingentum æris aut omnino nihil in suum censum præter caput attulissent, *proletarios* nominavit; ut ex iis quasi proles, id est quasi progenies civitatis exspectari videretur." Aul. Gell. lib. xvi. c. 10, who enters minutely into the distinction to be drawn between *proletarii*, *capite censi* and *assidui*: "Qui in plebe, inquit, Romana, tenuissimi pauperrimique erant, neque amplius quam mille quingentum æris in censum deferebant, *proletarii* appellati sunt; qui vero nullo aut perquam parvo ære censebantur, *capite censi* vocabantur; extremus autem census capite

censorum æris fuit trecenti septuaginta quinque." Festus, on the word *Assiduos*: ". . . Alii eum (adsiduum) qui sumptu proprio militabat, ab asse dando vocatum existimarunt." And on the word *Proletarium*: "Proletarium capite census dictum quod ex his civitas constet, quasi proles progenie. Idem et proletanei."

² Festus, on the word *Centuria*: "Centuria in agris significat centa jugera; in re militari *centum homines*." Varro, *De lingua latina*, lib. v. § 85; § 88: "*Manipulos*, exercitus minimas manus quæ unum secuntur signum. *Centuria*, qui sub uno centurione sunt, quorum centenarius justus numerus."

³ Vide supra.

sitated special men, selected without regard to the census. These formed special or extraordinary centuries annexed to one of the classes, though not forming part of it, under a property classification. Such were the engineers or carpenters, who formed two centuries attached, according to Livy, to the first class; the hornblowers and trumpeters forming two centuries, attached, according to the same historian, to the last class.

In a similar situation were the supplementary soldiers, "*accensi velati*," also inscribed and marching in the rear of the centuries of the last class, though of an inferior census.

63. Lastly, the third point to be observed is, that with regard to the citizens inscribed in the infantry classes, the nature itself of the military service required that attention should be paid to differences of ages. These citizens were consequently distributed in their respective classes in distinct centuries; the centuries of juniors (*juniorum*) having to undertake foreign service; the duties of the seniors (*seniorum*) being confined to the defence of the city.¹ Those who had assumed the virile robe on the completion of their sixteenth year were liable to enlistment in the former, while those who had attained their forty-sixth year were incorporated in the latter.²

64. We have next to notice the centuries as classified by the suffrage in the *comitia*, and it is here that we shall note the ingenuity in the mechanism of this political system. The principle was to take as an unit the vote of the century, as in the case of the curies in the old classification *ex generibus*; to give more centuries, and consequently more votes, to the first class, which represented the wealthier though less numerous

¹ Livy, lib. i. § 43: "Seniores, ad urbis custodiam ut præsto essent; juvenes, ut foris bella gererent."

² Aul. Gell. lib. x. ch. 28: "C. Tubero in *Historiarum* primo scripsit, Servium Tullium, regem populi Romani, cum illas quinque classes juniorum, census faciendi gratia, institueret, pueros esse existimasse, qui minores essent annis septemdecim: atque inde ab anno septimo decimo, quo idoneos jam esse reipublicæ arbitraretur, milites scripsisse:

cosque ad annum quadragesimum sextum *juniores*, supraque eum annum *seniores* appellasse." The age of sixteen completed or seventeen commenced is the admitted age for qualification for several other public departments. Livy, lib. xxii. § 57: "Juniores ab annis septemdecim;" and lib. xliii. § 14: "Minor annis sex et quadraginta." Consult Censorinus, *De die natali*, ch. 14.

entire army. This was the system upon which the army, whatever might be the nature of the duty on which it was to be employed, was recruited; but it was impossible to observe in every detail the exact proportions represented by this classification. From the last century, the entire body of the *proletarii* and the *capite censi* were in any case excluded.

SECTION XIV.

THE ASSEMBLY BY CENTURIES (*Comitia centuriata*).

66. These assemblies represented the aristocracy of wealth. As the people were arranged in military order and under arms these assemblies could not be held within the city; they were therefore held in the Campus Martius, and were convoked not by the lictors but by the sound of the bugle. While one section went to vote the remainder watched in arms on the Janiculum.¹ The suffrages were taken and calculated by centuries, beginning with the knights, then the classes in their order. In each class the order of the centuries was determined by lot, that to which it fell to vote first, being called *prærogativa* (from *præ rogare*).² As soon as the vote of a century was known it was proclaimed, and they then passed on to the next. As soon as the majority was ascertained the result was declared, and the remaining centuries were not called upon to vote; so that it never, or very seldom, happened that the inferior centuries were called upon for their suffrage. Livy says that it was rarely necessary to call upon the second class.³ In this way the power of determining all questions was lodged in the most wealthy centuries, and as for those of inferior rank, such for instance as the *proletarii* and *capite censi*, it may be said that they merely visited the

¹ Aul. Gell. lib. xv. ch. 27: "Curiata per lictorem curiatum calari, id est convocari: centuriata per cornicinem." "Centuriata autem comitia intra pomerium fieri nefas esse; quia exercitum extra urbem imperari oporteat; intra urbem imperari jus non sit: propterea centuriata in campo Martio haberi, exercitumque imperari præsidii causa solitum: quoniam populus esset in suf-

fragiis ferendis occupatus."

² Livy, lib. xxvi. § 22: "Prærogativa Veturia juniorum."

³ Livy, lib. i. § 43: "Equites enim vocabantur prima: octoginta inde primæ classis centuriæ; ibi se variaret, quod raro incidebat, ut secundæ classis vocarentur; nec fere unquam infra ita descenderet, ut ad infimos pervenirent."

Campus Martius, as spectators, to ascertain the division of the people, their own vote being a delusion. This mode of procedure would not have been so objectionable if the final result had not been declared till after all had voted, instead of which each vote was given aloud and the calculation made openly.

67. Aulus Gellius, who has given us the characteristic formula of the *comitia curiata*, "*Cum ex generibus hominum suffragium feratur, curiata comitia esse*," also gives that of the *comitia centuriata*, "*Cum ex censu et ætate, centuriata*."¹ The population, instead of being then distributed, as in the curies, according to their origin, as Ramnenses, Tatienses and Luceres, were distributed amongst the classes according to the census, and in each class according to age; the young and the old being placed in different centuries.

Thus, as the framework of the primitive system was constructed solely for the benefit of the original aristocracy and their descendants, this was based upon a principle that admitted all; the place assigned to each being determined by the rank of his census and his age. The *comitia centuriata* were also termed "*maximus comitiatus*."

68. These *comitia* or assemblies did not, in the beginning, take the place of complete substitutes for the *comitia curiata*; but rather existed concurrently with them. It would be difficult to say what attributes belonged to them in the first instance; but in the course of time the power of making laws, determining criminal charges and of creating magistrates became theirs. On the other hand the *comitia curiata*, gradually deprived of their functions, confined their operations to making certain elections, to the regulation of sacerdotal institutions, to passing the *lex curiata*, by which the *imperium* was conveyed, and to certain matters affecting the constitution of families, wills and adoptions; and were ultimately reduced to a pure symbol, being attached to things which had long since disappeared or ceased to exist except in the memory of the past.²

¹ Aul. Gell. lib. xv. ch. 27.

² Vide *supra*, § 31.

69. We must also apply to the *comitia centuriata* what has been said¹ concerning the *comitia curiata* as to the right of convoking the assembly, the necessity of the auspice, of there being but one matter to determine, of their deciding either in the affirmative or in the negative without the power of amendment; their liability to interruption and adjournment by the mere utterance of the words "*alio die*," indicating an unfavourable omen; and, finally, that their decrees had not the force of law till they had received from the senate its "*auctoritas*."²

Thus these assemblies were still, in all the foregoing particulars, under the predominating influence of the patricians; as a consequence of the formation and the number of the centuries they were subject to the influence of wealth; while the necessity for the "*auctoritas*" of the senate presents collectively a species of composite legislative power in which the king, the senate and the centuries of the citizens concur. At a later period, that is, in the year 340 B.C., under the popular dictatorship of Q. Publilius Philo, a law was passed which required the senate to give in advance its *auctoritas* to whatever laws should be presented to the *comitia centuriata*.³

SECTION XV.

THE KNIGHTS (*Equites*).

70. While the citizens were thus divided into different classes, regulated by the amount of their property, there was an order daily increasing in strength and destined, in the course of time, to hold a conspicuous position between the senators on the one hand and the plebeians on the other: this order was the Knights.

This institution, which first appears in the three centuries of

¹ Vide supra, § 28.

² Cicero, *De republica*, lib. i. § 32: "Quodque erat ad obtinendam potentiam nobilium vel maximum, vehementer id retinebatur, populi comitia ne

essent rata, nisi ea patrum approbasset auctoritas."

³ Livy, lib. viii. § 12: "Ut legum quæ comitiis centuriatis ferrentur, ante initum suffragium, Patres auctores fierent."

SECTION XVI.

THE NEW LOCAL TRIBES (*ex locis*).

71. These new tribes must not be confounded with those we have already mentioned, for although they both had the same appellation they differed widely as institutions. As the population of Rome was rapidly increased by the accession of strangers, it became no longer possible to maintain the old distinction of the three primitive tribes. We have already seen how this distinction, upon which the early Romans laid so much stress, had been, if not destroyed, at any rate counterbalanced in the senate, in the *comitia*, and in the cavalry.

Here we shall find it entirely effaced: the ancient tribes, whose origin was traced from race (*ex generibus*), gave place to the new tribes of Servius, determined by locality (*ex locis*).

72. The city, the boundaries of which were extended by Servius Tullius so as to enclose the seven hills, was divided into four tribes: the Palatina, Collina, Esquilina and the Suburana. Though origin was no longer the principle of division, yet, as a matter of fact, the districts assigned to the first three were those occupied by the three ancient tribes.¹ These are the four urban tribes, which with the growth of the city were gradually expanded, but were never increased in number.

73. The country around Rome, occupied by persons enjoying the rights of citizenship, was in like manner distributed into different districts, each with its separate name. These formed the rural tribes, which gradually increased in number with the extension of the city. The number in the time of Servius Tullius is uncertain; Dionysius of Halicarnassus, relying upon certain authorities, amongst whom was Cato, fixes it at twenty-six, which, with the four urban tribes, would give thirty at this early period.² But Livy, whose statement is much more in harmony with the general course of Roman history, and so

¹ Vide *supra*, § 21.

² Dion. lib. iv. § 19.

explicit as to render him the best authority, tells us that it was in proportion as the rights of citizenship were accorded to the occupants of adjoining territories and towns, ordinarily at the close of a census, that new tribes were added. In this way they would gradually extend throughout Italy, and, as a matter of fact, they did so extend as far as the sea, the river Arno and the Apennines. They usually took the name of the place where they were formed. From the time that there were in all twenty-one tribes, Livy gives an exact account of each subsequent addition till they reach their final number, thirty-five.¹

74. It was a bond of union between citizens to be members of the same tribe. It was by tribes that taxes were levied and the legions recruited; each tribe had its peculiar religious system and sacrifices.² As the members of the same *curia* called each other *curiales*, so the members of a tribe styled their fellows *tribules*, "*tribulis meus*;" and we often find in the official designation of a citizen the name of his tribe either inserted between or placed at the end of his other names.³

75. In the time of Servius the tribes did not form an assembly for the purpose of voting in the *comitia*, for then the votes were taken by centuries, the people having been divided and grouped after the census was complete; but a time came when the local tribes acquired a political existence, when magistrates were appointed by them, and new *comitia* were created in their

¹ Livy, lib. vi. § 5: "Tribus quatuor ex novis civibus additæ, *Stellatina*, *Tromentina*, *Sabatina*, *Arniensis*: eaque viginti quinque tribuum numerum explevere (an. 367)." Lib. vii. § 15: "Eodem anno duæ tribus, *Pomptina* et *Publilia*, additæ (an. 395)." Lib. viii. § 17: "Eodem anno census actus, novique cives censi, tribus propter eos additæ *Mæcia* et *Seaptia*: censores addiderunt Q. Publilius Philo, Sp. Postumius (an. 421)." Lib. ix. § 20: "Et duæ Romæ additæ tribus, *Ufentina* ac *Falerina* (an. 435)." Lib. x. § 9: "Et lustrum eo anno conditum a P. Semppronio Sopho et P. Sulpicio Saverione censoribus: tribusque additæ duæ, *Aniensis* ac *Terentina* (an. 454)." Sum-

mary of the 19th book (lost): "Lustrum a censoribus conditum est: censa sunt civium capita ducenta quinquaginta unum millia, ducenta viginti duo . . . Duæ tribus adjectæ sunt, *Velina* et *Quirina* (an. 512)." The two last complete the number thirty-five.

² Dion. lib. iv. § 18.

³ The acts of the senate given by Cicero, *Ad familiares*, lib. viii. ep. 8, furnish numerous examples: L. Villius L. F. *Pomptina* annalis; C. Septimius T. F. *Quirina*, etc. In the decree in the 9th Philippic, § 7: Serv. Sulpicius Q. F. *Lemonia*, Rufus. And in the epitaph recently discovered at Nîmes: "C. Melius C. F. Volt (*Voltinia*) sedatus, vivus sibi."

midst of an entirely plebeian character. Then the repartition of citizens into tribes, the number and the quality of those whose names were enrolled, became of the greatest political importance, and new expedients were sought, by the plebeians themselves, to check the influence of numbers when representing the lowest orders. The multitude became absorbed in the urban tribes, and consequently had but four votes, whereas the citizens of higher rank or larger property were distributed amongst the rural tribes, which hence became the most influential, having between them thirty-one votes in all.¹ Nothing of this, however, existed at the time of Servius, and the urban tribes consisted simply of the city population.



SECTION XVII.

THE ROYAL LAWS (*Leges Regiæ*)—THEIR COLLECTION BY PAPIRIUS (*Jus civile Papirianum*, or *Lex Papiria*).

76. B.C. 534. We have now nearly reached the expiration of the regal period. The jurist Pomponius, who is confirmed by other writers, assigns to the age of Tarquinius Superbus, the successor of Servius, a code which, if it were in existence, we might call the code of this period. Pomponius relates, that all the *leges curiata* promulgated by Romulus and his royal successors down to this period, were collected by the pontiff Sextus Papirius into one book, which received the title of "The Civil Law, by Papirius" (*Jus civile Papirianum*). Consequently Pomponius opens up the sources of Roman law by alluding to this code, and gives a list of jurists, beginning with the name of Papirius.²

¹ Livy, lib. ix. § 46: "Fabius, simul concordiæ causa, simul ne humillimorum in manu comitia essent, omnem forensē turbam excretam in quatuor tribus conjecit, urbanasque eas appellavit."

² Dig. 1, 2, *De origine juris*, 2, § 2, f. Pompon.: "Et ita leges quasdam et ipse curiatus ad populum tulit (Romulus). Tulerunt et sequentes reges: quæ omnes conscriptæ exstant in libro Sexti

Papirii, qui fuit illis temporibus quibus superbus Demarati Corinthii filius, ex principalibus viris. Is liber, ut diximus, appellatur *Jus civile Papirianum*; non quia Papirius de suo quicquam ibi adjecit, sed quod leges sine ordine latus in unum composuit." Ibid. § 36: "Fuit autem in primis peritus *Publius Papirius*, qui *Leges regias* in unum contulit." See also Dion. lib. iii. § 50.



The jurist Paul cites a commentary made by Granius Flaccus, a contemporary of Cicero, upon the *lex Papiria*;¹ and Macrobius, in his *Saturnalia*, in reference to a question of religious rites, quotes a passage from the *lex Papiria* itself; the Latin of which, however, is clearly not of the time of Papirius, but was probably derived from the commentary of Granius Flaccus or from some other derivative source.²

The ancient writers themselves more than once discussed the question of these royal laws. Livy says, that after the city was destroyed by fire by the Gauls B.C. 390, in which conflagration the writings of the pontiffs and other records, both public and private, perished, one of the first anxieties of succeeding magistrates was to collect all the treatises and laws that could be found. Their efforts resulted in obtaining copies of the Twelve Tables and certain royal laws.³

Cicero speaks of certain of the religious laws of Numa as being preserved upon monuments still existing in his time.⁴ (B.C. 106 to B.C. 43.)

Festus quotes the text of a law ascribed to Numa;⁵ but the most important fact is, that in the Digest of Justinian there are two fragments, the one from Papinian, the other from Marcellus, which contain quotations from the *lex regia*.⁶

Though the fact of the existence of these codes is thus attested, the same cannot be said either of their origin or of their true

¹ Dig. 50, 16, *De verborum significatione*, 144, f. Paul: "Granius Flaccus in libro de *Jure Papiriano* scribit, . . ." etc.

² Macrobius, *Saturnalia*, lib. iii. ch. 11: "In Papiriano enim Jure evidentiter relatum est, aræ vicem præstare posse mensam dicatam: 'Ut in templo,' inquit, . . ." etc. (Then follows the quotation.)

³ Livy, lib. vi. § 1: "In primis, fœdera ac leges, erant autem eæ duodecim tabulæ et quædam regiæ leges, conquiri, quæ compararent, jusserunt."

⁴ Cicero, *De republica*, lib. ii. § 14: "Pompilius . . . et animos, propositis legibus his quas in monumentis habemus, ardentes consuetudine et cupiditate bellandi, religionum cærimonibus mitigavit." Ibid. lib. v. § 2: "Qui

(Numa) legum etiam scriptor fuisset, quas scitis exstare." Tacitus mentions a religious law of King Tullus in his *Annals*, lib. xii. § 8, and gives in a few words a general view of the enactments of the different kings, lib. iii. § 25.

⁵ Festus, on the word *Parici*: "Id autem fuisse indicat lex Numæ Pompilii regis his composita verbis: SI QUIS HOMINEM LIBERUM DOLO SCIENS MORTI DUIT PARICIDA ESTO." See also the word *Termino*.

⁶ Dig. 11, 8, *De mortuo inferendo*, 2, f. Marcell.: "Negat lex regia, mulierem quæ prægnans mortua sit, humari autequam partus ei excidatur." *Collatio leg. Mos. et Roman.*, tit. 4, § 8, f. Papinian.: "Quum patri lex regia dederit in filium vitæ necisque potestatem."

character. Were they or not confined to matters of religion? Were they perhaps nothing more than an apocryphal version drawn up by the pontiffs? Was the collection made by Papirius confined to Pontifical law, or did it, as its title would seem to indicate, embrace the entire law?

Such are the questions that perplex the critic. These records are completely lost, and we know little more of the *leges regię* than their name. The reconstruction that has been attempted from the imperfect materials left us by ancient writers is nothing more than a speculation of modern ingenuity. That the subject, however, does admit of serious consideration is shown by the labours of M. Dirksen, in his *Essay upon the Sources of Roman Law* (1823).

Pomponius says the *leges regię* were abolished, after the expulsion of the kings, by the *lex Tribunicia*.¹ •

77. B.C. 510. According to Roman narrative two-and-a-half centuries had scarcely passed since the foundation of the city; seven kings only had occupied its throne, when it was destined to undergo a revolution of the most striking character. Hitherto the royal authority had been the check to the overbearing influence of the patricians. Servius had given the death-blow to supremacy of race. Tarquin, surnamed "the Proud," was still less willing to bend to the patrician will. The poppies which elevated their heads above their fellows were to be struck down. The struggle was between the aristocracy and the crown. The plebeians, on their part, were oppressed under the yoke of their task-masters like the Egyptians under their Pharaohs, or rather like the Etruscans under their lucumons; and, toiling in trenches and subterranean passages, they erected monuments which still exist to testify to their labours—the conquerors of nations converted into hewers of wood and drawers of water.² The senate and the patricians seized the opportunity that presented itself. The attempt made upon the chaste Lucretia fired the indignation of the people and Rome became a consular republic.

¹ Dig. 1, 2, *De orig. jur.*, 2, § 3, f. Pomp.

² Livy, lib. i. § 59: "Addita superbia ipsius regis miserięque et labores plebis,

in fossas cloacasque exhauriendas demersę. Romanos homines, victores omnium circa populorum, opifices ac lapidas pro bellatoribus factos."

Before we proceed to the consideration of the second period, let us review the past, and, bringing together in one line of vision the point from which the Romans started, and that at which they have now arrived, let us scan their political development and glance at the progress made in their institutions and manners.

REVIEW OF THE PRECEDING PERIOD.

FOREIGN POLICY.

78. The early policy of Rome was aggressive. The small adjoining boroughs and the larger towns by which it was surrounded were destroyed, and their inhabitants transported to Rome, there to enjoy equal rights with their conquerors. At this time the privilege of a Roman citizen, shared even by the vanquished, was not the coveted distinction it afterwards became.

When Rome had acquired a population and a territory which gave it rank among surrounding states and enabled it to extend its limits, instead of destroying the towns it subjected and importing their inhabitants into Rome, it established Roman colonies in those places in imitation of the practice of other Italian nations. It was in this way that the Umbrians, the Etruscans and the Sabines had propagated their respective races and extended their power in different parts of Italy.

The *proletarii* and the enfranchised, amongst whom a portion of the lands taken from the conquered as spoil of war was divided, were sent out to occupy the newly-acquired territory. The conquered inhabitants, left in the enjoyment of the residue of their ancient possessions, were in some instances admitted into and formed part of the new Roman colony; in others they were suffered to live side by side with their conquerors, by whom they were governed. These colonies at the same time served as outposts to the metropolis, protecting its territory and facilitating its future conquests. Under the kings they were few in

number, and but little is known of the way in which they were governed: they rapidly increased, however, under the republic. The first Roman maritime colony was Ostia, founded at the mouth of the Tiber by Ancus Martius between B.C. 640 and 617.¹

79. In order to escape the barbarities then attending conquest, the destruction of their city, the loss of their lands, the distribution of their property as booty amongst the victorious soldiery, and slavery, it was not an uncommon thing for a people to surrender at discretion. Those who adopted this course were termed *dediticii*. Livy gives us the precise formula employed upon the occasion when the people of Collatia submitted to the Romans under L. Tarquinius: "The king demanded:—Are (not) you the ambassadors and orators sent from the people of Collatia? We are.—Are the Collatians an independent people? They are.—Do you deliver yourselves, the Collatian people, your city, your lands, water, boundaries, sanctuaries, utensils, your property, whether sacred or secular, to me and the Roman people as a gift? We give them.—I then receive them."²

The people who thus yielded were treated with more or less generosity, according to the circumstances, which varied in each case.

80. The policy by which a conquered city was destroyed, or turned into a colony, or forced into voluntary surrender, was not, of course, carried out with the neighbouring people who were powerful enough to contend with them on equal terms. Vanquished in one engagement, they almost immediately returned to the struggle; nor did fortune always favour the Romans, for notwithstanding the colour given to these events in Roman annals and tradition, evidence is not wanting of occasional failure.

¹ Vide supra, § 48.

² Livy, lib. i. § 38: "Rex interrogavit: 'Estisne vos legati oratoresque missi a populo Collatino? Sumus. — Estne populus Collatinus in sua potestate?

Est.—Deditisne vos, populum Collatinum, urbem, agros, aquam, terminos, delubra, utensilia, divina humanaque omnia, in meam populi que Romani ditionem? Dedimus.—At ego recipio.'"

though not determined by any positive law, are generally defined in the following manner:—

The people elected the kings, sometimes gave their consent to declarations of war or peace, affirmed or negatived the passing or repeal of laws, subject however to the *auctoritas* of the senate, which was necessary to give validity to the proceeding.

The senate was consulted upon all important matters of administration; it suggested alterations of the law; declarations of war and negotiations for peace were submitted to it before being laid before the people; the decisions of the *comitia* required its *auctoritas* or approbation, by which it united with the people (*auctor fit*) to give executive force to their decisions. Its decrees were called *senatus-consulta*.

The king had the command of the army; he convoked the *comitia* and the senate, caused the laws to be executed and justice administered, and frequently, as sovereign pontiff, presided at religious ceremonies.

83. The modern division of sovereign power into several distinct branches and their independent operation had no place in the government of Rome. This subtle analysis, which is the result of an advanced civilization, and especially of the metaphysical tendencies of a later age, had not entered the mind of the Romans. But if, in order to form an estimate of the actual condition of these institutions at this time, we apply this analysis, we shall obtain the following results:—

LEGISLATIVE POWER. This was exercised by the king, the senate and the people. The king appears usually to have taken the initiative. All projects were, however, examined and discussed in the senate before the convocation of the people. These latter deliberated, at first in the assembly of the curies, *comitia curiata*, where, by a system the principles of which are unknown to us in detail, the suffrage was taken *ex generibus*, and where the preponderance was secured to the old patrician caste; later, in the assembly of the centuries, where the suffrage was taken according to the census and to age, *ex censu et ætate*, so that by an ingenious distribution the elder, though fewer in number in each section, were put on a par with the younger;

1st. The college of the pontiffs. This college was at first composed of four members: one of these, the president, was called the high pontiff (*pontifex maximus*). It was the head of the sacerdotal hierarchy, having a religious jurisdiction over the entire priesthood, and many matters, both public and private, which were intimately connected with religion; such, for example, as adoptions, funerals, the religious obligations due by each family to its gods and to its household deities.

It was the duty of the *pontifex maximus* to commit to writing the principal events of each year, and to expose them upon an album or white tablet which was suspended in his house, and generally to keep these *annales maximi*, which have proved one of the few sources of information, concerning this period, open to the poet and the historian of later date.¹

The pontifical dignity, which was confined to the patricians, was conferred for life. The election to vacancies was made by the remaining members, it being a self-electing body.² The election of *pontifex maximus* from among their number was, however, made by the *comitia*. At what period this practice commenced is uncertain; that such was the case in later times is clear, but that it was so at this epoch is mere conjecture.

2nd. The college of the *augurs* consisted at this period of four members, whose chief duty was to consult the heavens previous to any important enterprise. More than once we have seen them dissolve an assembly or stop a general on the eve of an attack, because the omens were not propitious. At the time of the division of the people into three tribes, each of the three furnished an augur.³ When the old divisions were replaced by the four local tribes of Servius, they became four in number, or one for each tribe.

3rd. The college of the *feciales*. The duty of these officers was confined to international law, in relation to treaties of alliance and war.

¹ Cicero, *De oratore*, lib. ii. § 12: "Ab initio rerum Romanarum usque ad P. Mucium, pontificem maximum, res omnes singulorum annorum mandabat litteris pontifex maximus, efferebatque in album, et proponebat tabulam domi, potestas ut esset populo cognoscendi; ii, qui etiam nunc Annales maximi nominantur."

² Dion. lib. ii. § 75.

³ Cicero, *De republica*, lib. ii. § 9: "Ex singulis tribubus singulos cooptavit augures (Romulus)."

portant points of distinction between the private status of the two castes.

On the one hand, the patrician could boast an origin coeval with the foundation of Rome; he could point to one of the old nobles as his father (*qui patrem ciere possunt, id est, nihil ultra quam ingenui*); in tracing his lineage step by step back to the progenitor of his race, he could say that none of his ancestry had been tainted by vassalage (*quorum majorum nemo servitutem servivit*); and his race, having no genealogy but its own, constituted it a *gens* (*vos solos gentem habere*), which included both the plebeians subject to it by the ties of clientage and the enfranchised, to whom it had given liberty—a double class of dependants to whom the *gens* communicated its name and rites (*sacra gentilitia*)—to whom the head of the *gens* was a patron, a civil father and a chief (*pater*).

On the other hand the plebeian of doubtful or servile origin was frequently unable to say whence he came; he could in no instance trace his lineage back without coming to a client who had been enfranchised, or to one whose origin was lost; he thus had no *gens* of his own, and generally traced his stock from a dependant of some patrician *gens*.

Such is the radical difference between the two castes, the basis upon which rests the distinction between public and private legal rights; and such were the plebeians who, in course of time, increased in number and strength, till at length they found themselves in a position to contest step by step the right to equality with their patrician superiors.

88. All private law among the Romans was based upon one idea. The hand (*manus*) was the symbol of power. Chattels, slaves, children, wife and freedmen, all were subject to the chief—in *manu*—an expression which, at a later period, acquired a more special signification. But the means by which the warrior acquired power and was enabled to get his property within his grasp (*manu capere*), was by the lance, the wielders or possessors of which were the *Quirites*—a symbol that long remained in use after the actual prototype had disappeared. Even in the solemnities of marriage, long after these primitive times, it was the

custom to pass a lance over the head of the bride, in token of the power over her (*manus*) her husband was about to acquire.¹

That which we now call property bore a name very expressive of the then state of civilization—*mancipium*, which was applied at the same time to the object of possession and to the power of possession itself (*manu captum*).

89. As the lance represented acquisition by violence, so there was a remarkable symbol which occupied a most important position in connection with a transaction of private law—the peaceable transfer of possession (*manus*) over property (*mancipium*). We allude to the ceremony with the piece of brass and the balance, *per æs et libram*, called *nexum*, *mancipium*, and at a later period *mancipatio*. Here we have a relic of the time when money passed by weight—a *libripens* holds the balance, five citizens, representing perhaps the five classes of the census, are present as witnesses; the metal is given and weighed; certain words containing the law of the contract, *lex mancipii*, are pronounced, and the *manus*, the power, is transmitted from the seller to the buyer. Money, which had long been in use amongst the Italian nations, was early adopted by the Romans, and copper coins, bearing the impression of an ox or a sheep, whence the term “*pecunia*,” were early introduced; yet the solemnity *per æs et libram* was retained, and, although symbolical, regarded as necessary.

90. As on the one hand *manus* was the basis of Quiritarian private right, so on the other *mancipatio*, or the solemnity *per æs et libram*, was the form chiefly used for the establishment, the modification or the extinction of rights. By it interests in land were acquired, the property in beasts of burden or of draught was passed, slaves transferred, and the power over the wife or the freedman established; by it civil obligations were contracted, and the validity of the last will or testament depended upon its proper observance.

¹ Festus, on the word *Celibari*: “*Celibari hasta caput nubentis comebatur . . . quod nuptiali jure imperio viri subjicitur nubens: quia hasta sum-*

ma armorum et imperii est.” Festus gives also several other explanations of this usage, but this is the correct one.

This solemnity was in many instances purely plebeian, and by it the inferior class was enabled to arrive at results attained by the higher through means considered more dignified. Thus, while the patrician wife passed into the power of her husband by the religious ceremony termed the *confarreatio*, the character of which and the attendant symbol are full of dignity and nobility, and which qualified the children of the marriage to undertake high sacerdotal functions, the plebeian woman was sold to her husband for a piece of brass weighed out in the balance *per æs et libram*, or might be acquired as a chattel by possession for one year. So, while the curies were convoked to hear a patrician declare his testament, to deliberate whether the disposition he desired to make was consistent with the interests of an aristocratic family, whether the nominated heir was worthy of admission after the death of the testator to the place occupied by him in the corporation; while, in fact, the testament of a patrician was regarded as nothing less than a law of the *curia*, the plebeian testament consisted of a sale during his life *per æs et libram* of his estate, to take effect upon his death. By this ceremony also the plebeian bound himself or his children either to redress a wrong, to raise money, or to give security for money borrowed.

91. But the most striking feature of Roman manners is the family. Grouped around its chief, subject to his despotic rule, it exists, a small isolated body complete in itself, surrounded by the other component parts of the general body of society.

The head, *pater familias*, is alone in private law capable of having rights or obligations. All under his power are but his agents, his instruments. He is sole proprietor of the property in his or their possession: even the persons constituting his household are his property. His slaves, his children, his wife and his freedmen are under his immediate power and control. Around him, though not so intimately connected with him, are his enfranchised, and, when the *pater* is a patrician, his clients. To this state of things several institutions, to which constant reference is made in the civil law relating to persons, owe their origin.

1st. Slavery, which introduced into the state and into families a class of human beings almost destitute of rights, who, like any other ordinary chattels, could be disposed of by the owner at will—an institution, though contrary to nature, yet common to all nations of the period.

2nd. The paternal power, which was of peculiar force among the Romans; for it made the father supreme over his son whatever might be his age, as also over his son's children and the fruits of his labour, and extended even to the power of life and death.

3rd. The marital power, when the woman passed under the authority of her husband—a power perhaps less absolute than either of the two former, because it was moderated by the influence of the wife's relatives.

4th. The power over freemen, who, though ranked by the state as free, could, as to the family, be subject to the chief, its head, reduced to a species of property and assimilated to slaves. Whether we regard them as children or other dependants sold or abandoned *per æs et libram* by their chief, or as debtors who, in default of payment, were adjudicated by the magistrate to their creditors (*addicti*), or as those who voluntarily sold themselves *per æs et libram* for a given time to creditors in satisfaction of their debt, *nexi*.

5th. Enfranchisement, which transferred a person from the condition of a chattel to that of a free man without at the same time severing all the ties and obligations which bound him to his ancient master. Thus was created in Rome a peculiar class of citizens, which retained through several generations the impress of their original slavery. It is not known how enfranchisement was effected prior to the institution of the census. After that period it was accomplished by simply writing the name of the individual in the census or list of citizens. Dionysius ascribes to Servius the admission of the enfranchised to the rights of citizenship and their inscription in the urban tribes.¹

6th. Clientage was a condition at the same time political and private, by which the plebeians were subject to the superior

¹ Dion. lib. iv. § 26.

race, and distributed amongst their families as dependants of the patrician *gentes*. The client and his descendants became a part of his patron's *gens*: they assumed with a terminal modification its name and adopted its peculiar rites (*sacra gentilitia*); and in default of natural heirs the *gens* became the successor. The patron and his client were bound by mutual obligations, and religion and custom clothed these duties with so sacred a character, that he who violated them—when human sacrifices were in vogue—was publicly immolated at one of the religious festivals: *sacer esto*.

The patricians alone had clients, and in the earliest period of Roman history every plebeian was attached by this bond to some aristocratic *gens*; in the course of time, however, the new order of plebeians steadily increasing, and being free from such ties, absorbed these first germs of the Roman population. The *gentes*, the first race, and their dependants the plebeians, the nucleus of the Roman people, disappeared, and with them real clientage was gone, having been transformed by the course of time and the progress of civilization into an institution existing merely in name, sustained only for ostentation and intrigue.

92. If from the condition of persons at this period we pass to that of property, our attention will be first arrested by the *Ager Romanus* or Quiritarian land. The Quiritarian title to land could only be enjoyed by Roman citizens, and was confined to certain lands. The different kings of Rome, Romulus, Ancus, Tarquinius Priscus and Servius Tullius, are represented by the historian as tracing and successively extending the limits of this *Ager Romanus*, and dividing it amongst the citizens in allotments, either to the several curies or to separate individuals, *viritim*.¹ The Quiritarian land ceased to increase in extent from the last survey made by Servius Tullius.² In vain did Rome by conquest after conquest invade the world and extend the limits of its dominion,—the *Ager Romanus* remained as it had been fixed. And no greater favour could be granted by the maternal city than the endowment of other land with a par-

¹ Dion., *Antiquit.*, lib. iii. § 1. Cicero, *De republica*, lib. ii. §§ 14, 18.

² Dion. lib. iv. § 13.

SECOND PERIOD.

THE REPUBLIC.

I. TO THE PASSING OF THE LAWS OF THE TWELVE TABLES.

93. IT is impossible for several distinct powers to exist side by side in the same state without rivalry and antagonism. If there are three, two of them will unite to destroy the third. Are there but two, the struggle is only the more severe. Rome furnishes us with an illustration of this. Of the three political bodies we have seen existing in the state, the patrician and plebeian alone remained at the epoch at which we have arrived. They had united in their efforts to overthrow the kings, and they then entered upon that protracted contest with each other, in which the patricians, who were at first in sole possession of all the honours, privileges and dignities of the state, beheld them one by one taken away or shared by their opponents, the plebeians. It was a struggle which, originating in the liberation of the two orders from regal authority, terminated in their subjection to imperial despotism (B.C. 509). It would appear at first sight as if the government had undergone but slight change. There was no apparent innovation in the *comitia*, in the senate, or in the administration generally. The regal authority had only been transferred to two consuls, elected like the kings themselves by the people, but whose power was limited to one year. The position, however, of the nobles, and the spirit of the citizens, were completely altered, and all that followed turned upon this transformation. If we can credit Livy, Servius had conceived the project of abdicating in order himself to establish the consular form of government; and, ac-

ording to him, this change was effected by the *comitia* of the centuries, but although the form remained the same the spirit had entirely changed.¹

The consuls, though in certain respects we might agree with Cicero in calling them two annual kings, were in reality far from occupying the place of kings. These functionaries, superior to the senators and the plebeians, had constituted in themselves an independent political body, and had established an equilibrium between themselves, the people and the senate. The consuls, on the other hand, were patricians; they were controlled by the senate and transacted nothing except under its influence. The equilibrium, therefore, had to be established between the senate and the people, and the regal functions which had been exercised by the kings had to be shared between the two remaining political bodies.

The senate augmented its executive power; the administration was concentrated within it; to it was entrusted the duty of contracting all treaties with allies and with enemies; in a word, it held the helm of state. The revolution was in fact an aristocratic revolution. It was the patrician caste that gathered its first fruits, and the senate, adopting the expression of Cicero, so controlled the republic, that everything was done by its authority and nothing by that of the people.*

The people, however, believed themselves free. They had, in fact, tested their strength; they knew that they made laws and magistrates; they knew that the yoke which they had imposed upon themselves they could when they should think fit cast off. In appearance, they had increased their independence, and they flattered themselves their power also. The *fascēs* of the consuls were bowed before them; the pain of death awaited

¹ Livy, lib. i. § 48: "Id ipsum tam mite ac tam moderatum imperium, tamen, quia unus esset, deponere eum in animo habuisse quidam auctores sunt; ni scelus intestinum liberandæ patriæ consilia agitantibus intervenisset." § 60: "Duo consules inde comitiis centuriatis a præfecto Urbis ex commentariis Servii Tulli creati sunt, L. Junius Brutus et L. Tarquinius Collatinus."

* Cicero, *De republica*, lib. ii. § 32: "Tenuit igitur hoc in statu senatus

republicam temporibus illis, ut in populo libero pauca per populum, plebique senatus auctoritate et instituto ac more gererentur, atque uti consules potestatem haberent tempore duntaxat annuam, genere ipso ac jure regiam. Quodque erat ad obtinendam potentiam nobilium vel maximum, vehementer id retinebatur, populi comitia ne essent rata, nisi ea patrum approbavisset auctoritas."

him who dared to take upon himself the office of magistrate without their consent; death was the penalty of aspiring to royalty; and to them there lay the right of appeal against the sentence of any magistrate who should condemn a citizen to death, to exile, or to the scourge.



SECTION XVIII.

THE VALERIAN LAWS (*Leges Valeriæ*).

QUESTORS OF HOMICIDE (*Quæstores Parricidii*).

94. The laws passed at this period, owing to the influence of the people, are known as the Valerian Laws, because it was on the motion of the Consul Valerius Publicola that they were decreed by the centuries—*Leges Valeriæ*—the last of which in order first demands our attention.

This law prohibited any sentence depriving a citizen of life, liberty or the rights of citizenship from being pronounced irrevocably by a single magistrate, and established in all such cases the right of appeal to the people in *comitia* by centuries (*provocatio ad populum*). But did not this right, which Livy dignifies as the *unicum præsidium libertatis*, exist under the kings? Several historians are of opinion that it did, and Cicero, in his Republic, says: "*Provocationem autem etiam a regibus fuisse declarant pontificales libri, significant nostri etiam augurales.*"

The Valerian law transformed into written law that which had been previously a mere custom, frequently neglected, or perhaps respected only where the rights of the patrician caste were involved.

As it was prohibited to create any magistrate without the right of *provocatio*, a breach of this law might be punished capitally and the offender put to death with impunity.¹

¹ Cicero, *De republica*, lib. ii. § 31. Dig. 1, 2, *De origine juris*, 2, § 16, f. Pompon. Livy, lib. iii. § 55: "Ne quis ullum magistratum sine provoca-

tione creasset: qui creasset, eum jus fasque esset occidi: neve ea cædes capitalis noxæ haberetur."

95. Any private individual, equally with a magistrate, was at liberty to prosecute before the people for capital crimes; the *comitia*, however, frequently delegated their power to citizens called *quæstores parricidii*, whose duty it was to preside at the investigation of these charges (*qui capitalibus rebus præessent*), direct the proceedings, and deliver judgment in the name of the people.¹ *Parricidium* signifies at this period *paris-cidium*—the murder of one's equal—homicide; and not, as in later times, *patris-cidium*—the murder of a father—patricide. In Festus we find this law ascribed to Numa, “*Si quis hominem liberum dolo sciens morti duit, parricida esto.*”

96. The Valerian law did not apply to foreigners or slaves, who could be punished, scourged, or put to death by the consuls upon their own authority; nor was it in force beyond one mile from the city,² consequently it ceased to apply to the army as soon as it had passed this limit; indeed, had such a barrier been opposed to the *imperium* of the general, the rigid discipline for which the Roman army was so conspicuous would soon have been destroyed; and, lastly, it did not reach the paternal power (*patria potestas*). Hence the anomaly that a man, who could not be capitally punished by the state except by the will of the whole people, might be put to death by the order of his father.

SECTION XIX.

QUÆSTORS OF THE PUBLIC REVENUE.

97. To the same consul Valerius is also ascribed the creation of a new magistracy. Hitherto the guardianship and administration of the public revenue had been entrusted first to the kings and subsequently to the consuls. On the motion of Valerius two quæstors were appointed by the people expressly for these duties. They were called quæstors because it was their duty to seek and collect the public taxes (*qui pecuniæ*

¹ Dig. 1, 2, *De origine juris*, 2, § 23, f. Pompon. provocationem esse longius ab urbe mille passuum.”

² Livy, lib. iii. § 20: “Neque enim

præsent), as those whose duty it was to seek out evidence in cases of capital crimes had been called *quæstores parricidii*.¹ The creation of this office was the beginning of the dismemberment of the consulate: it was at first exclusively confined to patricians, and became the first step to the highest dignities.

SECTION XX.

DICTATOR, OR MASTER OF THE PEOPLE (*Dictator, Magister Populi*).

MASTER OF THE CAVALRY (*Magister Equitum*).

98. Tarquin did not remain inactive after his expulsion. The wars that he waged against the Romans compelled them to exert all their energies, and at the end of nine years from the downfall of the throne, menaced from without by a powerful army collected against them by the son-in-law of Tarquin, and while the safety of the republic was equally in danger from internal dissension between the two orders, the senate resorted to vigorous action, and, following a Latin example, created a new officer, called the dictator.

99. (B.C. 501.) Acting upon the authority of the senate, the consuls selected from among the patricians a dictator, who was invested for six months with supreme power. As chief magistrate, he ruled Rome; as general, he commanded the army. The axe was restored to the *fusces* of his lictors: he could condemn citizens to the scourge, exile or death without the appeal, *provocatio ad populum*. The appeal to a colleague, as in the case of the consuls, no longer existed; for the dictator possessed the sole authority: his word was law.² In this way the patricians escaped the operation of the Valerian laws, which were secured to the plebeians upon the expulsion of the kings; in this way they recovered for a brief space their power and the

¹ Dig. 1, 2, *De origine juris*, 2, § 22.

² Pompon.

³ Livy, *lib.* 2, § 18: "Neque enim ut in consilibus, qui pari potestate ce-

sent, alterius auxilium. neque provocatio erat: neque ullum noxam, nisi in cura parendi, auxilium."

title "master of the people" (*magister populi*), which we find in the earlier Roman writers, but which the force of custom replaced by a less significant appellation, attests the character of this office.¹ An authority so absolute was well calculated to save the state in a trying crisis: hence we find resort was had to this measure on all subsequent occasions when the commonwealth was in danger; but it had also a tendency to arbitrary despotism, and did in fact terminate in this: not, indeed, so long as the dictators, citizens of the republic, thought only of its salvation, and laid down their fasces when a crisis had passed or their term of office had expired, but at a later period, when generals fought for themselves or for a party.

100. The dictator was provided with a lieutenant, whom he was at liberty to select, and who was styled the "master of the horse" (*magister equitum*)—a military office whose origin was said to date from the time of the kings and to have existed even under Romulus.² It is worthy of notice that this mounted lieutenant headed the young nobles, of whom the cavalry mainly consisted, whereas the dictator, whether in the city or in the field, marched on foot, preceded by his twenty-four lictors, at the head of the infantry, who were plebeians, thus appearing rather to command them than the patricians.

101. But be that as it may, the office of dictator, as also that of the master of the horse, was like all other high offices confined to the patrician order, and to it was attached the distinction of the lictors and the fasces.

SECTION XXI.

THE STRUGGLE BETWEEN THE PLEBEIANS AND THE PATRICIANS.

102. As soon as the fear of Tarquin and his party had subsided, and the dictator had been deprived of his authority, the

¹ Cicero, *De republica*, lib. i. § 40: "Nam Dictator quidem ab eo appellatur, quia dicitur; sed in nostris libris vides eum magistrum populi appellari."

Dig. 1, 2, *De origine juris*, 2, § 19, f. Pompon.

² Dig. 1, 2, *De origine juris*, 2, § 19, f. Pompon. Lydus, lib. i. § 14.

tranquillity which for a brief period had resulted from the approach of danger and the suppression of the plebeians, was interrupted, and the struggle between the two orders recommenced. The political situation of the plebeians was by no means promising. The senate was composed solely of patricians: they had a monopoly of religious offices, of the posts of consul, quæstor, dictator, master of the horse; they alone held military command, and ruled in the *comitia* of the curies and the centuries; in the one by virtue of their race, in the other by reason of their wealth. Nor was the situation of the plebeians as regards the conditions of private life any better; poor, and but little addicted to mercantile affairs or the practice of the mechanical arts, pursuits at that period scarcely known in Rome, with no other resource open to them than agriculture or war, the plebeians might be forced at any time, by an unproductive harvest or an unsuccessful enterprise, to borrow from the wealthy. When in due course the time for payment came, the debtor, finding himself unable to discharge his liability, was forced to sacrifice himself, and by the ceremony *per æs et libram* entered into a condition of servitude to his creditor, known as *nexus*; or in virtue of the rights to which we have already alluded the creditor claimed him as a slave (*addictus*) from the magistrate, and took possession of him as his own property. Such sufferings and personal degradations, which were far from unfrequent, when added to political grievances, could not fail to be followed by disastrous consequences. Often in order to avert a threatening storm, or allay the rising wave of popular discontent, would the senate decree a general discharge of all liabilities, debtors would be restored to liberty, and those who had by pecuniary obligation been reduced to a state of servitude (*nexi* or *addicti*) be granted their freedom. But such relief was spasmodic—the law remained unaltered.¹

¹ Cicero, *De republica*, lib. ii. § 34. condition, especially under Servius
Like ameliorations took place in their Tullius.



SECTION XXII.

PLEBEIAN TRIBUNES (*Tribuni Plebis*).THE SACRED LAWS (*Leges Sacræ*).

103. One of these debtors, an old soldier, having escaped from the house of his creditor, appeared in the public streets covered with stripes. The spectators became excited; discontent spread rapidly, and after a brief period of popular agitation and the failure of attempts at compromise, the plebeians retired in arms to Mons Aventinus on the other side of the Anio (B.C. 494). This sedition, besides the remission of their existing debts and the liberation of the debtors, was attended by serious consequences to the patricians. They had in their order two consuls; they were now forced to let the plebeians have two magistrates, plebeian tribunes (*tribuni plebis*), and not "tribunes of the people," as they are frequently called.

104. These tribunes were chosen from among the plebeians, but at first they were nominated by the curies. Their functions originally were not initiative, nor did the office at first confer executive power. It was, properly speaking, solely protective. It was the province of the tribunes to shelter the plebeians from acts of violence or injustice (*in auxilium plebis; contra vim auxilium*). This protection was secured by what was termed their intercession (*intercedere, intercessio*), or their opposition—the veto which they were empowered to pronounce upon the acts of the consuls, other magistrates, and even upon the decrees of the senate. At a later period they acquired executive power, and the right of initiating action.¹

105. The strongest guarantees of these rights were exacted. The *populus* confirmed them in the *comitia* by centuries; they were sanctioned by the senate, and consecrated by religious ceremonies. The tribunes themselves, the hill to which the plebeians had retired, the laws which secured these privileges, became sacred objects; the hill took the name of the sacred

¹ Cicero, *De republica*, lib. ii. § 34. *De legibus*, lib. iii. § 7. The Claudian Tables; vide *supra*, § 10, note. Dig. 1,

2, *De origine juris*, 2, § 20, f. Pompon. Festus, on the word *Sacer mons*.

mount (*mons Sacer*); the laws that of the sacred laws (*leges sacræ*); the person of the tribunes was inviolable (*sacrosancta*); and the head of him who should attempt a tribune's life was forfeited to Jupiter (*caput Jovi sacrum*), and his family sold in aid of the sacrifices to Ceres.¹



SECTION XXIII.

THE COMITIA BY TRIBES (*Comitia tributa*).
PLEBISCITA (*Plebis-scita*).

106. This first victory of the plebeians led to all the others. The tribunes, at first two in number, were soon raised to five (B.C. 471), then to ten (B.C. 457). It is true that in making this augmentation the patricians intended to deal a blow at the power of the plebeians by introducing discord into their ranks, but the measure had not this result at first. Eager to obtain the favour of their order, and ready to oppose the senators and patricians, they took counsel among themselves as to the line of policy they would adopt; and acting under the advice of their most influential men, and being partly guided by circumstances, they convoked an assembly of the mass of the plebeians distributed in the tribes. This assembly was held for the first time, in the form of an institution recognized by the senate, for the avowed purpose of sitting in judgment upon a patrician, Coriolanus (B.C. 489).

These assemblies, convened without consultation of augurs, and convoked and presided over for the most part by plebeians, though originally intended solely for the political deliberations of a single order of citizens, soon acquired the right of pronouncing judgment in certain cases, of making certain elections, and of passing laws affecting private rights, and, in fact, became a branch of the legislature.

The curies were an institution where the aristocracy of race formed the principle of division; in the centuries that principle was the aristocracy of wealth. But the division among the

¹ Livy, lib. iii. § 55.

plebeians was by tribes; and here the plebeian element was paramount, whether from the fact that their order alone was represented there, or that both orders being represented, the plebeian preponderated. We must bear in mind that in law all the people, whether patrician or plebeian, were partitioned into local tribes; but, in point of fact, the constitution of these assemblies by tribes was purely plebeian. The tribunes were merely representatives of this class, and, as such, the patricians were not called upon to recognize their authority. We may learn here how important results may follow from mere outward classification, and how the exclusive character of the system under which the old national race distinction was carried out, as in the curies and in the ingenious combination of Servius, intended to give preponderance to wealth, eventually affected the constitution of Roman government. The unit, for the purposes of voting, being the tribe, and each citizen having in his tribe an equal vote, the influence of the plebeian element preponderated; and as unity of purpose is always characteristic of this element, in that it is swayed by one impulse, viz., the spirit of opposition to the antagonistic order, it is sure in the long run to prevail.

These assemblies bore at the date of their commencement the name of *concilia*, indicative of their character as secret councils composed of one section of the people; but they are more frequently designated as *comitia tributa*, comitias by tribes. Their decisions were termed *plebis-scita*, decrees of the plebeians; and some writers, for the sake of distinction, have designated under the term *populi-scita*, or decrees of the people, the laws passed by the other comitias.

107. Thus, dating from this epoch, we have the three kinds of assemblies which the history of Rome presents, clearly defined: 1st. The ancient and aristocratic assemblies of the old patriciate, or the ancient races of the Ramnenses, Tatienses and Luceres, or, in other words, the *comitia* by curies (*comitia curiata*); 2nd. The assemblies of the entire people with the preponderance secured to wealth, or the *comitia* by centuries (*comitia centuriata*); and 3rdly. The plebeian assemblies, or

the *comitia* by tribes (*comitia tributa*). Aulus Gellius, who has given us the formula of the two former, also furnishes us with the formula of the latter. And in order to distinguish each clearly, we may follow him in saying that the votes were given after the following manner: in the first by nobility of birth; in the second by wealth ascertained by the census and by age; in the third by local distinctions.¹

SECTION XXIV.

PLEBEIAN EDILES (*Ædiles Plebei*).

108. The assemblies of the plebeians kept constantly in view the improvement of the position of their own class. And as the consuls had under them two quæstors, they added to the tribunes two magistrates elected from among the plebeians, whom they named plebeian ediles (*ædiles plebei*); officials who had charge of the details of police administration and the protection of the edifices where the plebiscita were deposited.²

SECTION XXV.

ORIGIN OF THE TWELVE TABLES (*Lex* OR *Leges XII Tabularum*, *Lex decemviralis*).

DECEMVIRS.

109. The plebeians, under the direction of their tribunes, vigorously followed up the important advantage they had gained, and, after a long resistance on the part of the patricians, success, at least in part, attended their efforts. It was clear that the law, public and private, had two fundamental defects: on the one hand, it was indefinite and unfamiliar to the common herd; and, on the other, it bore unequally on the two orders of

¹ Aul. Gell. lib. 15, § 27: "Cum ex generibus hominum suffragium feratur, curiata comitia esse; cum ex censu et ætate, centuriata; cum ex regionibus

et locis, tributa."

² Dig. 1, 2, *De origine juris*, 2, § 21, f. Pompon.

society. An unknown and mysterious power, it was a formidable weapon in the hands of the patricians, and enabled them to keep the lower orders in check and under their control. The efforts of the plebeians were therefore directed mainly to two things: to secure publicity and equal laws for all classes (*æquanda libertas:—summis infimisque jura æquare*).¹ And, with this object in view, they demanded that the positive laws of the republic should be reduced to writing and promulgated.

Notwithstanding the obscurity which attends this question, we can see that the point contended for was nothing less than the equalization of the two orders: this was what the patricians were opposing throughout the struggle from consulate to consulate, which lasted with various vicissitudes from B.C. 462 to B.C. 451. According to some historians three patricians, whose names are mentioned, were sent to Greece in the year B.C. 454, in order to collect the laws of that country; and upon their return two years afterwards with the Attic laws, Hermodorus, an exile from Ephesus, to whose honour a statue was erected at Rome,² explained them to the people. The story of their mission to Greece was firmly believed by the Romans, but ever since the time of Vico it has been questioned by critical historians.

Treated as fable by some, and admitted to rest upon the evidence of certain monuments by others, this story must be allowed to remain among the numerous problems of Roman history which cannot be cleared up. We do not consider that much importance, in a legal point of view, attaches to this controversy.

This much, however, appears certain, that the Greek laws were not unknown to the compilers of the Twelve Tables; and though they imitated the Greek laws in certain trivial details,³ yet the basis of the Roman civil law is not borrowed, but original,

¹ Livy, lib. iii. § 31. Dion. lib. x. §§ 1 and 63.

² Livy, lib. iii. § 31 et seq. Dion. lib. x. § 64. Dig. 1, 2, *De orig. jur.*, 2, § 4, f. Pompon. Plin., *Hist. natur.*, 34, 5. Cicero, *De legib.*, lib. ii. §§ 23 and 25.

Dig. 10, 1, *Fin. regund.*, 13, f. Gai.; and 47, 22, *De coll. et corp.*, 4, f. Gai. Lydus, *De magistratibus*, lib. i. § 84.

³ See below, Table VII., and Dig. 10, 1, *Fin. regund.*, 13, f. Gai. lib. iv. of his commentary on the Twelve Tables.

and possesses its own characteristic features, and it is as such that we must regard it.

Be that as it may, in the year 303 (B.C. 451) from the foundation of Rome, according to the calculation of the Romans, and in the year which followed the return of its deputies, that is, if we accept the fact of the mission as a reality, ten magistrates were chosen by the *comitia* from the order of the senators, and were commissioned to draw up the civil laws of their republic.

110. (B.C. ⁴⁵¹454.) These magistrates were called decemvirs (*decemviri*); they were endowed with exceptional powers, and from their decrees there was no *provocatio ad populum*; other functionaries were temporarily suspended; the consuls, the quaestors, the ediles, and even the tribunes, laid down their authority. For the space of one year everything was placed in their hands. During this period they conducted their government prudently; they voluntarily submitted certain capital cases to the decision of the people; they permitted an appeal from one another, which was called *intercessio collegiæ*; and they drew up Ten Tables of the laws, which, after having been exposed to public view (*promulgatæ*), were confirmed in the *comitia centuriata*. On the expiration of the year their term of office was completed, but their task was not finished: and ten decemvirs, amongst whom, according to Dionysius (contradicted in this however by Livy), were certain plebeians, were chosen for the new year. These, far from imitating the moderation of their predecessors, availed themselves of their power to oppress Rome, and maintained their position during a period of three years. The crime of one of their number put an end to their tyranny. The blood of Virginia, immolated by her father, recalled to the memory of the Romans the history of Lucretia; the soldiers advanced in arms towards Rome, and encamped upon the Sacred Mount; the people revolted in the towns, and the power of the decemvirs was overthrown. Two of them perished in prison; the remaining eight were sent into exile, and the estates of the whole were confiscated in the year B.C. 452. The consuls, the tribunes and other officers were

immediately re-instated, and the government assumed its original form.

111. These later decemvirs had added two supplementary tables, which were incorporated with the former, and thus the law was embodied in what we call the Twelve Tables.

Such was the origin of this primitive monument of Roman jurisprudence, called for distinction "The Law," *Lex* (*Leges XII Tabularum, Lex decemviralis*). As a *carmen necessarium* it was the custom to make children commit it to memory, for imagination was sometimes fertile enough to enable people to believe that they could recognize a poetical character in its clauses.¹ These laws, which survived so many ages of Roman history, and even outlived the republic itself, were held in such respect that the slightest alteration was never permitted. Cicero speaks of them in enthusiastic language.² The provisions, however, of this code are in many instances rude, and even barbarous; the style is concise and imperative; and although there are passages which are unintelligible to us, yet on the whole the Twelve Tables assist us in forming a correct view of the manners of Rome, and the degree of civilization to which it had at that time attained.



SECTION XXVI.

THE FRAGMENTS OF THE TWELVE TABLES AS PRESERVED TO US.

112. The fragments of the Twelve Tables that we possess have been collected from different authors throughout whose pages they are scattered. In the order of their arrangement a good deal has been presumed. However, Cicero tells us that

¹ Although we find certain rhythmical terminations in the greater part of the laws of the Twelve Tables, they cannot be regarded as verse. The expression "*carmen*," among the Romans, had a much more general signification.

² "Say what they will, I shall say what I think. By heaven, in my eyes,

the little book of the laws of the Twelve Tables, with regard to the source and principles of law, is preferable to the libraries of all the philosophers that ever lived, both as to the weight of authority and extent of utility."—Cic., *De Or.*, 1—44.

the first table contained the *invocatio in jus*; that the tenth treated of religious ceremonies and funeral rites, and that one of the last two prohibited intermarriage between patricians and plebeians, while Dionysius indicates the existence in the fourth of the permission of a father to sell his children.

Starting from these definite indications, and aided by other hints and considerations, we have arrived at the probable order of the subject of each table.¹

The question of the order of the Twelve Tables is not without its influence upon the subsequent course of Roman law. It served as a type and model,—a framework, so to speak, in accordance with which the whole fabric of subsequent legislation was in after time constructed; as, for instance, the edicts of the Prætors, the code of Theodosius, and even the code and digest of Justinian.

113. We are indebted to Jacques Godefroy² for much deep research into this subject, and all who have followed him, whether in France or elsewhere, have benefited by the result of his labours, but we may complain of much want of accuracy. A slight presumption, a phrase in another author, frequently sufficed to make him adopt a passage as a portion of the laws of the Twelve Tables, to complete the context or to assign it a given place. In the laws themselves, of which the terms, and original phraseology, have descended to us, he did not hesitate to make additions or alterations rendered necessary in his view by what he supposed to be the sense.

M. Haubold,³ in the spirit of a more accurate critic, has accepted only those fragments which are given to us as extracts from the Twelve Tables, and thus reduces to an exceedingly

¹ Gaius wrote six books on the Twelve Tables. We find in the Digest twenty fragments of this work, with references to the books from which they are extracted. It has been supposed that each of these six books corresponded to two of the Tables, and this supposition has served as a guide. The arrangement of the Prætorian edicts of the Theodosian code, and finally of the code and digests of Justinian, appears

to have been derived from this source.

² Jacq. Godefroy, *Fragmenta XII Tabularum, suis nunc primum tabulis restituta, probationibus, notis et indice munita*. Heidelberg, 1616, in 4to. Reprinted in his collection, *Fontes IV juris civilis*. Geneva, 1638, in 4to, and 1653, in 4to.

³ Haubold, *Instit. juris Rom. privat. hist. dogm. epitome*. Leips. 1821, p. 129.

small compass those which are actually in our possession. And finally MM. Dirksen and Zell have revised the labours of Godefroy, and remedied much of his inaccuracy. Thus, where provisions have been lost, traces of which, however, are to be found in different authors, they have contented themselves with giving the passages containing these traces; and they have supplemented the old fragments with the later ones furnished by the discovery of Cicero's "Republic," and more especially that of the "Institutes of Gaius."¹

I shall avail myself of the results of all these efforts and discoveries, especially of the last, to which I give the preference. It will be necessary, however, to make several modifications and some additions. On the one hand MM. Dirksen and Zell have not used the fragments in the Vatican, notwithstanding that they contain some indications of the arrangement of the Twelve Tables.² On the other hand I shall be careful to distinguish the emendations of commentators from the text of the fragments as it has been transmitted to us; for, in my opinion, it is better to lay before the student incomplete and mutilated fragments, than to attempt a reconstruction. Nor is it certain that, even as regards the fragments themselves, we have the actual and original text. For, in the lapse of time, language and the mode of expressing it in writing, undergo successive modifications, and it is in these modified forms, familiarised by daily use and incorporated into the literature of the Romans, that the fragments of the Twelve Tables have been handed down to us.

¹ H. E. Dirksen, *Uebersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Zwölf-Tafel-Fragmente*. (Review of the attempts made up to the present time to

criticize and reconstruct the texts of Fragments of the Twelve Tables.) Leipzig, 1824.

² See below, Table V. § 8, and Table VI. § 11.

FRAGMENTS OF THE TWELVE TABLES.¹

TABLE I.

THE SUMMONS BEFORE THE MAGISTRATE (*De in jus vocando*).

I.

Si in jus vocat, ni it, antestator; igitur em capito.²

If you summon a man before a magistrate and he refuses to go, take witnesses and arrest him.

II.

Si calvitur, pedemve struit: manum endojacito.³

If he attempts evasion or flight, lay hands upon him.

III.

Si morbus ævitæve vitium escit, qui in jus vocabit jumentum dato; si nolet, arceram ne sternito.⁴

If he be prevented by sickness or old age, let him who summons him before the magistrate provide the means of transport; but not a covered vehicle, unless as an act of benevolence.

IV.

Assiduo vindex assiduus esto; proletario quoi quis volet vindex esto.⁵

For a rich man a rich man only can be *vindex* (this is a kind of bail). In the case of a *proletarius*, anyone may be *vindex*.

¹ Prompted by the desire to be strictly faithful to the text of the fragments actually existing of the Twelve Tables, I hesitate to import the passages derived from other authors in order to assist in their reconstruction. I confine myself to the analysis of the provisions contained in these passages, and put the quotations in the form of notes. It is unnecessary to premise that the heading of each table must not be taken as a literal indication of its contents; in fact, the terms in which they are couched are in many instances quite foreign to the legal language of that period.

² Porphyrius, *Ad Horat.*, sat. 1, 9, line 65. Cicero, *De leg.*, 2, 4. Lucilius,

Sat., lib. 17, according to Nonius Marcellus, *De propr. serm.*, cap. 1, § 20, on the word *Calvitur*. Aul. Gell., *Noct. attic.*, 20, 1. Auctor *Rhetor. ad Herenn.*, 2, 13.

³ Festus, on the words *Struere* and *Pedem struit*. Dig. 50, 16, *De verbor. signif.*, 233, f. Gal. lib. i. of his commentary on the Twelve Tables. Lucilius, in the passage already cited.

⁴ Aul. Gell., *Noct. attic.*, 20, 1. Varro, in Non. Marcell., *De propr. serm.*, cap. 1, § 270. Varro, *De ling. latin.*, 4, 31.

⁵ Aul. Gell., *Noct. attic.*, 16, 19. Varro, in Non. Marcell., *De propr. serm.*, cap. 1, § *antepenult.*

V.

Rem ubi pagunt, orato.¹

If the parties agree, that is to say, come to terms, let the suit be stopped and the matter arranged.

VI.

Ni pagunt, in comitio ant in foro ante meridiem causam conjicito, quom perorant ambo præsentes.²

If no arrangement is made between the parties, let the cause be entered before midday, either in the comitium or in the forum, in the presence of both parties.

VII.

Post meridiem, præsenti stlitem addicito.³

After midday let the magistrate grant judgment to the party present. (That is to say, that the magistrate shall either grant the thing or the right which is the subject of the suit, or, according to an interpretation which we think less probable, merely the conduct of the cause before the judge.)

VIII.

Sol occasus suprema tempestas esto.⁴

No step shall be taken in an action after sunset.

IX.

Vades . . . subvades . . .⁵

Vades—subvades. (That is to say, it was necessary there should be bail or sureties given by the parties respectively to secure their attendance before the magistrate on a future day in cases where the matter could not be at once determined, or to appear in due course before the judge, a kind of promise called *vadimonium*.)

¹ Auctor *Rhetor. ad Herenn.*, 2, 13. Priscianus, *Ars grammat.*, 10, 5, 32.

² Aul. Gell., *Noct. attic.*, 17, 2. Quintilianus, 1, 6. Plinius, *Hist. nat.*, 7, 60.

³ It may be fairly doubted whether these two fragments, VI. and VII., have reference to the office of the magistrate or the judge, and consequently whether they belong to the first or second Table. The *causæ coniectio*, or entry of the cause and the judgment by default against the absent party belonging to the procedure before the judge, as explained in the author's third volume on the commentaries, *Explica-*

tion hist. des Instit., when treating of actions. On the other hand, the word *addictio* cannot be applied except to a magistrate. We adopt the latter sense, explaining this difficulty by the difference of period.

⁴ Aul. Gell., *ibid.* Festus, on the word *Supremus*. Varro, *De ling. latin.*, 5, 2, and 6, 3. Macrobius, *Saturn.*, 1, 3. Censorin., *De die nat.*, cap. fin.

⁵ Aul. Gell., *Noct. attic.*, 16, cap. 10. Consult Gaius, *Instit.*, comm. 4, §§ 184 et seq., on *Vadimonium*; Varro, *De ling. latin.*, 5, 7; and Acron., *Horat. Satyr.*, 1, 1, verse 11.

The work of MM. Dirksen and Zell

TABLE II.

JUDICIAL PROCEEDINGS (*De judiciis*).

I.

* * * *

The provisions of the Twelve Tables upon the amount to be deposited, called *sacramentum*, by the litigants respectively.¹

II.

Morbus soticus . . . status dies cum hoste . . . quid horum fuit unum, judici, arbitrove, reove, dies diffusus esto.²

. . . A serious illness . . . an engagement with a *peregrinus* . . . should either of these circumstances exist in connection with the judge, the arbiter or one of the litigants, the cause must be adjourned.

III.

Cui testimonium defuerit, is tertiis diebus ob portum obvolutum ito.³

Anyone who wants a witness must summon him by calling upon him in a loud voice, stating that he will require his attendance on the third day of the market (that is to say, on the twenty-seventh day from the first summons, the market taking place every ninth day).

IV.

* * * *

The provision which permitted the compounding of a theft.⁴

assigns to the first Table that which is indicated to us by the abridgment of Festus, the precise terms of which are wanting as a provision of the Twelfth Table: "Itaque in *XII cautum est*: ut idem juris esset Sanatibus, quod fortibus id est bonis et qui nunquam defecerant a populo Romano." Paulus and Festus, on the word *Sanates*.

¹ "Pœna autem sacramenti aut quingenaria erat, aut quinquagenaria, (nam) de rebus mille æris plurisve quingentis assibus, de minoris (vero) quinquaginta assibus sacramento contende(b)atur: nam (ita) lege *XII Tabularum cautum erat*. (Sed si de libertate) hominis (contro)versia erat, etsi pretiosissimus

homo esset, tamen ut L assibus sacramento contenderetur *ea(dem) lege cautum est* favoris (causa), ne (sa)tisdatione onerarentur adsertores." Gai., *Instit.*, comm. 4, § 14.

² Aul. Gell., *Noct. attic.*, 20, 1. Cicero, *De offic.*, 1, 12. Festus, on the word *Reus*. Dig. 2, 11, *Si quis* caut. in *jud.*, 2, § 3, f. Ulp.

³ Festus, on the words *Portus* and *Vagulatio*.

⁴ "Et in cæteris igitur omnibus ad edictum prætoris pertinentibus, quæ non ad publicam læsionem, sed ad rem familiarem respiciant, pacisci licet; nam et de furto *pacisci lex permittit*." Dig. 2, 14, *De pactis*, 7, § 14, f. Ulp.

TABLE III.

EXECUTION FOLLOWING CONFESSION OR JUDGMENT (*De ære confesso rebusque jure judicatis*).¹

I.

Æris confessi rebusque jure judicatis
triginta dies justi sunt.²

In case of debt either upon confession or judgment, the debtor shall have thirty days' grace.

II.

Post deinde manus injectio esto, in jus
ducito.³

That term having expired, the plaintiff shall have the *manus injectio* (a species of *actio legis* or execution of final process) to bring the debtor before the magistrate.

III.

Ni judicatum facit, aut quips endo em
jure vindicet, secum ducito; vincito,
aut nervo, aut compedibus, quindecim
pondo ne majore, aut si volet minore
vincito.⁴

If the debt is not paid, or (*vindex*) surety provided, the creditor shall take the debtor, put him into chains or into the stocks, the weight of the chains not to exceed fifteen pounds, but less at the creditor's will.

IV.

Si volet suo vivito; ni suo vivit, qui
em victum habebit, libras farris endo
dies dato; si volet, plus dato.⁵

The debtor shall be at liberty to live as he thinks fit, provided it be at his own expense. In the event of his being unable to provide his own nourishment, the creditor in whose custody he is shall supply him with at least one pound of bread daily.

V.

* * * * *

Provision relating to—

1°. The right of compromise.

2°. The debtor's captivity in default of compromise within sixty days, and of his production during this interval in the

¹ Or according to the title generally received concerning credits, *De rebus creditis*. The title that we adopt for ourselves explains both its contents and is more consistent with the order previously followed. The first treats of the summons before the magistrate, the second of the trial itself, the third of the execution of the sentence; thus forming a complete outline of civil procedure.

² Aul. Gell., *Noct. attio.*, 20, 1, and 15, 13. Gai., *Instit.*, comm. 3, § 78. Dig. 42, 1, *De re judicata*, 7, f. Gai.

³ Aul. Gell., *Noct. attio.*, 20, 1. Gai., *Instit.*, comm. 4, § 21, on the *Manus injectio*.

⁴ Ibid.

⁵ Aul. Gell., *Noct. attio.*, 10, 1. See also Dig. 50, 16, *De verbor. sign.*, 234, § 2, f. of Gai. lib. ii., Commentary on the Twelve Tables.

comitium on three successive market days, and the public declaration of the amount in which he was condemned.¹

VI.

* * * *

Provision allowing the creditor after the third market day, he not being paid, either to put his debtor to death or to sell him to any stranger resident beyond the Tiber, and which, in the case of there being several creditors, enacts as follows:—

*Tertiis nundinis partis secanto; si plus minusve secuerint, ne fraude esto.*²

After the third market day, his body may be divided. Anyone taking more than his just share shall be held guiltless.

TABLE IV.

THE RIGHTS OF THE FATHER (*De jure patrio*).

I.

* * * *

Provision as to the immediate destruction of monstrous or deformed offspring.³

¹ "Erat autem jus interea paciscendi; ac nisi pacti forent, habebantur in vinculis dies sexaginta; inter eos dies trinis nundinis continuis, ad prætorem in comitium producebantur, quantæque pecuniæ judicati essent prædicabatur." Aul. Gell., *Noct. attio.*, 20, 1.

² "Tertiis autem nundinis capite pœnas dabant, aut trans Tiberim peregre venum ibant. Sed eam capitis pœnam sanciendæ, sicut dixi, fidei gratia, horrificam atrocitatis ostentu, novisque terroribus metuendam reddiderunt. Nam si plures forent, quibus reus esset judicatus, secare, si vellent, atque partiri corpus *addicti sibi hominis* permiserunt. Et quidem *verba ipsa legis dicam* ne existimes invidiam me istam forte formidare (following the words of the law given below in the text). Nihil profecto immitius, nihil immanius; nisi ut reipsa apparet, eo consilio tanta immanitas pœnæ denuntiata est, ne ad eam unquam perveniretur. Addici

namque nunc et vinciri multos videmus; quia vinculorum pœnam deterrimi homines contemnunt. Dissectum esse antiquitus neminem equidem neque legi, neque audivi: quoniam sævitia ista pœnæ contemni non quita est." Aul. Gell. 20, 1.

"Sunt enim quædam non laudabilia natura, sed jure concessa: ut in XII Tabulis debitoris corpus inter creditores dividi licuit; quam legem mos publicus repudiavit." Quintilianus, *Institut. orat.*, 3, 6.

"Sed et judicatos in partes secari a creditoribus leges erant: consensu tamen publico crudelitas postea erasa est; et in pudoris notam capitis conversæ est, honorum adhibita proscriptione, suffundere maluit hominis sanguinem quam effundere." Tertullian, *Apol.*, cap. 4.

³ "Nam mihi quidem pestifera videtur (Cicero, by his brother Quintus, speaking of the power of the tribunes

II.

- • • • • Provision relating to the control of the father over his children, the right existing during their whole life to imprison, scourge, keep to rustic labour in chains, to sell or slay, even though they may be in the enjoyment of high state offices.¹

III.

- Si pater filium ter venum dedit, filius a patre liber esto.² Three consecutive sales of the son by the father releases the former from the *patria potestas*.

IV.

- • • • • Provision relating to the duration of gestation: no child born more than ten months after the decease of his reputed father to be held legitimate.³

TABLE V.

INHERITANCE AND TUTELAGE (*De hæreditatibus et tutelis*).

I.

- • • • • Provision relating to the perpetual tutelage of women. Vestals are free both from their tutelage and from the *patria potestas*.⁴

of the plebeians), quippe quæ in seditione et ad seditionem nata sit: cujus primum ortum si recordari volumus, inter arma civium, et occupatis et obsessis urbis locis, procreatum videmus. Deinde quum esset cito aslegatus (*others read letatus or necatus*) *tanquam ex XII Tabulis insignis ad difformitatem puer*, brevi tempore recreatus, multoque tætrior et fœdior natus est." Cicero, *De leg.*, 3, 8.

¹ "At Romanorum legislator (Romulus) omnem, ut ita dicam, potestatem in filium patri concessit, idque toto vitæ tempore: sive eum in carcerem conjicere, sive flagris cædere, sive vinctum ad rusticum opus detinere, sive occidere vellet; licet filius jam rempublicam administraret et inter summos magistratus censeretur, et propter suum studium in rempublicam laudaretur

. . . Sed sublato regno, decemviri (eam legem) inter cæteras retulerunt, *exstatque in XII Tabularum, ut vocant, quarta*, quas tunc in foro posuere." Transl. Dion., *Archæol.*, 2, 26 and 27.

"Quum patri lex regia dederit in filium vitæ necisque potestatem," etc. Papinianus, lib. sing. *De adulteriis*, extracted from *Collatio leg. Mosaic. et Rom.*, tit. 4, § 8.

² Ulpian., *Regul.*, tit. 10, § 1. Gai., *Instit.*, comm. 1, § 132, and 4, § 79. Dion. as above.

³ Aul. Gell., *Noct. attic.*, 3, 16. Dig. 38, 16, *De suis et legitim.*, 3, § 9, f. Ulp.

⁴ "Veteres enim voluerunt, feminas, etiamsi perfectæ ætatis sint, propter animi levitatem in tutela esse. Itaque si quis filio filisq; testamento tutorem dederit, et ambo ad pubertatem perve-

II.

• • • • •

Provision prohibiting the usucapion of *res Mancipi* belonging to females under the tutelage of their agnates, except in the case where they have been delivered by the woman herself with the authority of her tutor.¹

III.

Uti legasset super pecunia tutelave suæ rei, ita jus esto.²

The testament of the father shall be law as to all provisions concerning his property and the tutelage thereof.

IV.

Si intestato moritur, cui suus hæres nec sit, adgnatus proximus familiam habeto.³

In the event of his death intestate and without *suius hæres*, the nearest agnate shall succeed.

V.

Si adgnatus nec escit, gentilis familiam nancitor.⁴

In default of agnates the gentiles shall succeed.

VI.

* * * * *

In the event of no tutor being specified in the will, the agnates are the legitimate tutors.⁵

nerint, filius quidem desinit habere tutorem, filia vero nihilominus in tutela permanet. Tantum enim ex lege Julia et Papia Poppæa jure liberorum a tutela liberantur feminae. Loquimur autem exceptis virginibus vestalibus, quas etiam veteres in honorem sacerdotii liberæ esse voluerunt; itaque etiam lege *XII Tabularum cautum est*." Gai., *Instit.*, comm. 1, §§ 144, 145, 155 and 157.

¹ "(Item olim) mulieris quæ in agnatorum tutela erat, res Mancipi usucapi non poterant, præterquam si ab ipsa, tutore (auctore) tradita essent: id ita lege *XII Tabularum cautum erat*." Gai., *Instit.*, comm. 2, § 47. See Cicero, *Epist. ad Attic.*, 1, 5; and *Pro Flacco*, 84.

² Ulpian, *Regul.*, 11, § 14. Gai., *Instit.*, comm. 2, § 224. Justinian., *Instit.*, 2, 22, *De lege Falcidia*, pr. Dig. 50, 16, *De verb. signif.*, 120, f. Pomp. Cicero, *De invent. rhetor.*, 2, 50. Auctor *Rhetor. ad Herenn.*, 1, 13. Justinian., *Novell.*, 22, cap. 2.

³ Cicero, *De invent.*, 2, 50. Auctor *Rhetor. ad Herenn.*, 1, 13. Ulpian.,

Regul., 26, 1, § 1. Paul., *Sentent.*, lib. iv. tit. 8, § 3, according to *Collat. leg. Mos. et Rom.*, 16, § 3. Paul., *ibid.*, § 22: "The law of the Twelve Tables calls the agnates to succession without distinction of sex." Gai., *Instit.*, comm. 1, §§ 155, 157, and 3, § 9. Just., *Instit.*, 3, 1, *De hæred. quæ ab intestat.*, § 1. The constitution (III.) of Severus and Antonine, code 6, 55, *De suis et legitim. liber.*, indicates as coming from a clear provision of the Twelve Tables, the principle that the inheritance as to the *hæres suus* was distributed *per stirpes*. However Gaius, *Instit.*, comm. 3, § 15, derives this principle solely from interpretation. But this rule does not apply to the agnates.

⁴ Cicero, *De invent.*, 2, 50. Ulpian., according to *Collat. leg. Mos. et Rom.*, 16, § 4. Gai., *Instit.*, comm. 3, § 17. Paul., *Sentent.*, 4, 8, § 3, according to *Collat. leg. Mos. et Rom.*, 16, § 3.

⁵ "Quibus testamento quidem tutor datus non sit, iis ex lege *XII* agnati sunt tutores, qui vocantur legitimi." Gai., *Instit.*, comm. 1, §§ 155 and 157.

VII.

Si furiosus est, agnatorum gentiliumque
in eo pecuniaque ejus potestas esto.¹
Ast ei custos nec escit.²

The custody of an idiot and of his property, in case there is no curator (*custos*), belongs to the agnates; in default of agnates to his gentiles.

VIII.

Ex ea familia . . . in eam familiam.³

From this family . . . into that (a provision by which the inheritance of an enfranchised dying without *hæres suus* was transferred to his patron).

IX.

• • • • •

The inheritance is divided as of right among the heirs.⁴

X.

• • • • •

Provision from which is derived the *actio familiæ erciscundæ*, that is, the action which must be taken to enforce the division of an inheritance.⁵

XI.

• • • • •

The slave enfranchised by will, upon condition of his giving a certain sum to the heir, can, in the event of his being alienated by the heir, secure his freedom by the payment of this sum to the alienee.⁶

¹ Cicero, *De invent.*, 2, 50; *Tuscul. quæst.*, 3, 5; *De republ.*, 3, 23. Auctor *Rhetor. ad Herenn.*, 1, 13. Ulp. *Regul.*, 12, § 2, etc.

² Festus, on the word *Nec*.

³ "Civis Romani liberti hæreditatem *lex XII Tabularum patrono defert*, si intestato sine suo hærede libertus decesserit." Ulpian., *Regul.*, 29, § 1. "Sicut in XII Tabulis patroni appellatione etiam liberi patroni continentur." (*Vatic. J. R. Fragm.*, § 308.)

⁴ "Ad personas autem refertur familiæ significatio, ita, *cum de patrono et liberto loquitur lex: EX EA FAMILIA*, inquit, *IN EAM FAMILIAM*." Dig. 50, 16, *De verbor. signif.*, 195, § 1, f. Ulp. I am by no means sure that this passage of the Twelve Tables refers to the devolution of hereditary property here mentioned.

⁴ "Ea quæ in nominibus sunt, non recipiunt divisionem: cum ipso jure in portiones hæreditarias *ex lege XII Tabularum divisa sint*." Cod. 3, 36; *Famil. ercisc.*, 6 const. Gordian. Consult Dig. 10, 2, *Famil. ercisc.*, 25, § 9, f. Paul., etc.

⁵ "Hæc actio (action *familiæ erciscundæ*) *proficiscitur a lege XII Tabularum*." Dig. 10, 2, *Famil. ercisc.*, 1 pr., f. Gai. Ibid., 2 pr., f. Ulp. Festus, on the word *Ercutum*, etc.

⁶ "Sub hac conditione liber esse jusus, si decem millia hæredi dederit, et si ab hærede abalienatus sit, emptori dando pecuniam, ad libertatem perveniet; *idque lex XII Tabularum jubet*." Ulpian., *Regul.*, 2, § 4. Dig. 40, 7, *De stat. liber.*, 29, § 1, f. Pomp.; and 25, f. Modest. Festus, on the word *Statuliber*.

TABLE VI.

DOMINION AND POSSESSION (*De dominio et possessione*).

I.

Quum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto.¹

The words pronounced in the ceremonies of the *nexum* and the *mancipium* shall be law.

II.

• • • • •

Provision enforcing double payment as penalty for denying the declarations of the *nexum* or *mancipium*.²

III.

Usus auctoritas fundi biennium . . .
cæterarum omnium . . . (annuus).³

Possession for the period of two years in the case of land, or of one year in connection with other things, vests the property.

IV.

• • • • •

Provision relating to the acquisition of the marital power over the woman by the fact of possession of one year, with the faculty given to the woman of preventing this effect of possession by absenting herself for three nights consecutively in each year from the house of her husband.⁴

¹ Festus, on the word *Nuncupata*. Cicero, *De offic.*, 3, 16; *De orat.*, 1, 57; *Pro Cæcin.*, cap. 23. Varro, *De ling. lat.*, 5, 9.

² "De jure quidem prædiorum sanctum est apud nos jure civili, ut in his vendendis vitia dicerentur, quæ nota essent venditori. Nam cum ex *XII Tabulis* satis esset ea præstari quæ essent lingua nuncupata, quæ qui inficiatus esset, dupli pœnam subiret: a jurisconsultis etiam reticentiæ pœna est constituta." Cicero, *De offic.*, 3, 16.

³ We cannot be certain that this is really the text of the Twelve Tables. The following is the passage from Cicero whence it is extracted:—"Quod in re pari valet, valeat in hac quæ par est: ut quoniam *usus auctoritas fundi biennium* est, sit etiam ædium. At in lege ædes non appellantur, et sunt cæterarum omnium quarum annuus est usus." Cic. *Topic.* c. 4. Consult Cic. *pro Cæcin.*, 19; Gai. *Instit.*, comm. 2, § 42; Just. 1, 6, *Instit.*, De

usuacap. As to the interpretation of the words *usus auctoritas*, which have tormented the critics, I would remark that the Romans, in ancient legal language and in a particular sense, which remained for a long time in use, called the guarantee against eviction *auctoritas*. *Auctoritatem præstare* means, even in the time of Justinian, to guarantee against eviction. *Usus auctoritas* is then the prescriptive guarantee against eviction, that is to say, the effect of continuous possession during a certain time. In this way we see that this word, in ancient legal language, is synonymous with its equivalent of more modern times, *usucapio*.

⁴ "Usu in manum conveniebat, quæ anno continuo nupta perseverabat: nam velut annua possessione usucapiebatur, in familiam viri transibat, filiaque locum obtinebat. Itaque lege *XII Tabularum* cautum erat, si qua nollet eo modo in manum mariti convenire, ut quotannis trinotio abesset, atque ita

V.

Adversus hostem æterna auctoritas.¹

No possession by an alien, however long, can vest in him the property of a citizen.

VI.

Si qui in jure manum conserunt . . .²

In the case of the *manuum conserutio*. (This was a species of feigned judicial combat, a means adopted for trying the right to property in a given thing.) . . . (Let the magistrate give the provisional possession (*vindicicias dare* or *vindicicias dicere*) to whomsoever he may think fit.)

In the case, however, of a claim to liberty, the magistrate shall always give the provisional possession in favour of liberty.³

VII.

Tignum junctum ædibus vineæque et concapet ne solvito.⁴

Timber attached to a building or the support of a vine shall not be removed.

VIII.

• • • • •

But an action to recover the double value lies against the user of the property of another.⁵

usum ejusque anni interromperet." Gai., *Instit.*, comm. 1, § 111. See Aul. Gell., *Noct. attic.*, 3, 2; Macrob., *Saturnal.*, 1, 3.

¹ It is by deduction from a passage in Gaius, taken from lib. ii. of his Commentary on the Twelve Tables, and consequently corresponding most probably to Tables III. and IV., that the fragment "Adversus hostem, &c.," is usually placed in Table III. But judging from the nature of the subject it is evidently misplaced; we therefore put it in the fourth Table, as being appropriate to the subject of which it treats. We are not influenced by the passage quoted from Gaius; in fact that passage only contains a definition of the word "hostis," and it is not unlikely that this word was used in connection with other provisions of the third or fourth Tables; for example, where the debtor, "addictus," is permitted to be, after the delay of sixty days, sold to a foreigner.

² Aul. Gell., *Noct. attic.*, 20, 10. Festus, on the word *Superstites*.

³ "Initium fuisse secessionis dicitur Virginius quidam, qui quum animadvertisset Appium Claudium contra jus, quod ipse *ex vetere jure in XII Tabulas transtulerat*, vindicias filiae suae a se abdixisse, et secundum eum, qui in servitutem ab eo suppositus petierat, dixisse, captumque amore virginis omne fas ac nefas miscuisse," etc. Dig. 1, 2, *De origine juris*, 2, § 24, f. Pomp. Consult. Dion. 11, 80; Livy, 3, 44; Cicero, *De republ.*, 3, 82.

⁴ Festus, on the word *Tignum*. Dig. 50, 16, *De verbor. signif.*, 62, f. Gai. Dig. 47, 3, *De tigno juncto*, 1 pr., and § 1, f. Ulp., etc.

⁵ "Lex XII Tabularum neque solvere permittit tignum furtivum ædibus vel vineis junctum, neque vindicare: quod providenter lex effecit: ne vel ædificia sub hoc prætextu diruantur, vel vinearum cultura turbetur; *sed in eum qui convictus est junxisse*, in du-

IX.					
Quandoque	sarpta,	donec	dempta		If the material becomes detached, and so long as it remains so . . . (the owner can recover it by <i>vindicatio</i>).
erunt. ¹					
X.					
*	*	*	*	*	The property in a thing sold and delivered does not pass to the purchaser till payment. ²
XI.					
*	*	*	*	*	Provision confirming the <i>cessio</i> before the magistrate (in <i>jure cessio</i>), as likewise the <i>mancipatio</i> . ³

TABLE VII.

THE LAW CONCERNING REAL PROPERTY (*De jure ædium et agrorum*).

I.					
*	*	*	*	*	Two feet and a half at least must be left between adjoining edifices for the purposes of proper ventilation (<i>ambitus</i>). ⁴
II.					
*	*	*	*	*	Provisions concerning plantations and constructions or excavations upon adjoining plots of ground. ⁵

plum dat actionem." Dig. 47, 3, *De tign. junct.*, 1 pr., f. Ulp.

¹ Festus, on the word *Sarpuntur* (*vineæ*).

² "Venditæ vero res et traditæ non aliter emptori adquiruntur, quam si is venditori pretium solverit, vel alio modo satisfecerit, veluti expromissore aut pignore dato. *Quod cavetur quidem et lege XII Tabularum*, tamen recte dicitur et jure gentium, id est jure naturali, id effici." Justinian, *Instit.*, 2, *De rer. divis.*, § 41. Festus, on the words *Sub vos placo*.

³ . . . "Et mancipationem et in jure cessionem lex XII Tabularum confirmat." *Vat. J. R. Fragm.*, § 50. This provision is wanting, together with some items derived from the fragments of the Vatican (vide supra,

Table V. frag. 8, and note), in the work of MM. Dirksen and Zell, who have not had access to these fragments.

⁴ "Nam *ambitus* circumitus: ab eoque XII Tabularum interpretes *ambitum parietis* circumitum esse describunt." Varro, *De ling. lat.*, 5, § 22. "Lex etiam XII Tabularum argumento est, in qua duo pedes et semis *sestertius pes* vocatur." Festus, on the word *Ambitus*.

⁵ "Sciendum est, in actione finium regundorum illud observandum esse, quod ad exemplum quodammodo ejus legis scriptum est, quam Athenis Solonem dicitur tulisse; nam illic ita est. . . . Si quis sepem ad alienum prædium fixerit infoderitque, terminum ne excedito; si maceriam, pedem relinquito; si vero domum, pedes duos; si sepul-

III.

Hortus . . . hœredium . . . turgurium . . .¹

A garden . . . a small inheritance . . . a barn.

IV.

• • • • •

A space of five feet must be left between adjoining fields for the purposes of access and the turning of the plough. This space cannot be acquired by *usucapio*.²

V.

Si iurgant . . .³

If they disagree . . . (In the event of there being any dispute about the boundaries, the magistrate is to give three arbiters to the parties, who shall settle the matter.)

VI.

• • • • •

The breadth of a road is to be eight feet; at the end, where it turns, sixteen feet.⁴ If the road is impassable, the owner of a right of way may cross wherever he pleases.⁵

VII.

Si aqua pluvia nocet . . .⁶

If rain-water threatens damage. The proprietor whose property is threatened with damage arising from arti-

chrum aut scrobem foderit, quantum profunditatis habuerint, tantum spatii relinquo; si puteum, passus latitudinem; at vero oleam aut ficum ab alieno ad novem pedes plantato, cæteras arbores ad pedes quinque." Dig. 10, 1, *Fm. regund.*, 13, f. Gai. lib. iv. of his commentary on the Twelve Tables.

¹ Plin., *Hist. nat.*, lib. xix. cap. 4, § 1. Festus, on the words *Hortus*, *Hæredium* and *Tugurium*. Varro, *De re rustic.*, lib. i. cap. 10. Dig. 56, 16, *De verbor. signif.*, 180, f. Pompon.

² "Ex hac autem, non rerum, sed verborum discordia, controversia nata est de finibus: in qua quoniam *usuca-pionem XII Tabulæ intra quinque pedes* noluerunt, depasci veterem possessionem Academiæ ab hoc acuto homine non sinemus; nec Mamilia lege singuli, sed ex his (*XII Tabulis*) tres arbitrii fines regemus." Cicero, *De leg.*, 1, 21.

³ Non. Marcell., *De propr. sorm.*, 5, 34. Cicero, *De republ.*, 1, 4, 8. Con-

sult the passage from Cicero quoted in preceding note.

⁴ "Viæ latitudo ex lege *XII Tabularum* in porrectum octo pedes habet; in anfractum, id est ubi flexum est, sedecim." Dig. 8, 3, *De servit. præd. rustic.*, 8, f. Gai.

⁵ "Si via sit immunita, jubet lex, qua velit agere jumentum." Cic., *Pro Cæcina*, 19. Festus, on the word *Am-segetes*. The sense of the law of the Twelve Tables may be explained by analogy, by comparison with a fragment from Javolenus: "Cum via publica (vel) fluminis impetu, vel ruina amissa est: vicinus proximus viam præstare debet." (Dig. 8, 6, *Quemadmodum servitutes amittuntur*, 14, § 1.) A fragment of the Twelve Tables is given in connexion with this subject: "Si via per amsegetes immunita escit, qua volet jumentum agito;" but it is a supposititious text, a hypothetical reconstruction of Godefroy.

⁶ Dig. 40, 7, *De statuliber*, 21, f. Pomp.; Cic. *Top.* 9.

VIII.					<p>ficial works for the collection of rain-water, or from an aqueduct, has a right to demand a guarantee against this injury.¹</p>
•	•	•	•	•	<p>The branches of a tree overhanging adjoining property must be pruned all round up to fifteen feet from the ground.²</p>
IX.					
•	•	•	•	•	<p>A proprietor may go on to adjoining land to pick up the fruit that has fallen from his tree.³</p>

TABLE VIII.

ON TORTS (*De delictis*).

I.					Capital punishment is decreed against libellers and public defamers. ⁴
II.					
Si membrum rupit, ni cum eo pacit, talio esto. ⁵					Retaliation against him who breaks the limb of another and does not offer compensation.
III.					
•	•	•	•	•	For the fracture of the bone (of the tooth) of a freeman the penalty is 300 asses; in the case of a slave, 150. ⁶

¹ "Si per publicum locum rivus aqueductus privato nocebit, erit actio privato *ex lege XII Tabularum*, ut noxa domino caveatur." Dig. 43, 8, *Ne quid in loc. pub.*, 5, f. Paul. A suit of this nature was decided by an arbitrator (*arbiter aquæ pluvie arceatæ*). Dig. 39, 8, *De aq. et aq. pluv. arc.*, 23, § 2, f. Paul.; and 24, f. Alfen.

² "Quod ait prætor, et *lex XII Tabularum* efficere voluit, ut quindecim pedes altius rami arboris circumcidantur; et hoc idcirco effectum est, ne umbra arboris vicino prædio noceret." Dig. 43, 27, *De arbor. cædend.*, 1, § 8, f. Ulp.; and 2, f. Pomp. Paul., *Sentent.*, 5, 6, § 13.

³ "Cantum est præterea *lege XII*

Tabularum, ut glandem in alienum fundum procidentem liceret colligere." Plin., *Hist. nat.*, 16, 5. Dig. 43, 28, *De glande legenda*, 1, § 1, f. Ulp.; 50, 16, *De verb. signif.*, 236, § 1, f. Gai. lib. iv. Com. Twelve Tables.

⁴ "*Nostra contra XII Tabula* quam perpaucas res capite sanxissent, in his hanc quoque sancientiam putaverunt: 'Si quis occentavisset, sive carmen candidasset quod infamiam faceret flagitiumve alteri.'" Cicero, *De republ.*, 4, 10. Paul., *Sentent.*, 5, 14, § 6. Festus, on the word *Occentassint*, etc.

⁵ Festus, on the word *Talio*. Aul. Gell., *Noct. attic.*, 20, 1. Gai., *Instit.*, comm. 3, § 223, etc.

⁶ "*Pœna autem injuriarum ex lege XII Tabularum*, propter membrum

IV.

Si injuriam faxit alteri, viginti quinque
aeris poenae sunt.¹

For any injury whatsoever committed
upon another the penalty shall be 25
asses.

V.

. . . Ruptias . . . sarcito.²

. . . For damage unjustly caused
. . . (but if by accident) repara-
tion.

VI.

• • • • •

For damage caused by a quadruped,
reparation or the forfeiture of the
animal.³

VII.

• • • • •

An action shall lie against him who
depastures his flock upon a neigh-
bour's land.⁴

VIII.

Qui fruges excantasset⁵ . . . Neve
alienam segetem pellexeris . . .⁶

He who by enchantment shall blight
the crops of another, or attract them
from one field to another . . .

IX.

• • • • •

He who during the night furtively
either cuts or depastures a neigh-
bour's crops, if of the age of puberty,
shall be devoted to Ceres and put to
death; if under that age, he shall be
scourged at the discretion of the
magistrate and condemned in the
penalty of double the damage done.⁷

quidem ruptum, talio erat: propter os
vero fractum aut collisum trecentorum
assium poena erat, velut si libero os
fractum erat: at si servo CL: propter
ceteras vero injurias XXV assium poena
erat constituta." Gai., *Instit.*, comm.
3, § 223. Aul. Gell., *Noct. attio.*, 20,
1. Paul., *Sentent.*, 5, 14, § 6. *Collat.*
leg. Mos. et Rom., 2, § 5.

¹ Aul. Gell., *Noct. attio.*, 20, 1, and
16, 10. *Collat. leg. Mos. et Rom.*, 2,
§ 5. Gai., *Instit.*, comm. 3, § 223.
Festus, on the words *Viginti quinque*.

² Festus, on the word *Ruptias*.
Dig. 9, 2, *Ad leg. Aquiliam*, 1 pr., f.
Ulp.

³ "Si quadrupes pauperiem fecisse
dicetur, actio ex lege XII Tabularum
descendit: quæ lex voluit, aut dari id
quod nocuit, id est id animal quod
noxiam commisit, aut æstimationem
noxiae offerre." Dig. 9, 1, *Si quadrup.*

pauper. fecisse dicet., 6 pr., f. Ulp.
Justinian., *Instit.*, lib. iv. tit. 9, pr.

⁴ "Si glans ex arbore tua in meum
fundum cadat, eamque immisso pecore
depascam, Aristoteli scribit non sibi occur-
rere legitimam actionem, qua experiri
possim; nam neque ex lege XII Tabu-
larum de pastu pecoris, quia non in
tuo pascitur, neque de panperie, neque
de damno injuriæ agi posse, in factum
itaque erit agendum." Dig. 19, 5, *De*
præscript. verb., 14, § 3, fr. Ulp.

⁵ Plin., *Hist. nat.*, 28, 2.

⁶ Servius, *ad Virg.*, *Ecl.* 8, line 99.
Consult Senec., *Natur. quæst.*, 4, 7;
Plin., *Hist. natur.*, 30, 1; Augustin.,
De civ. Dei, 8, 19, etc.

⁷ "Frugem quidem aratro quæsitam
furtim noctu pavisse ac secuisse, pu-
beri XII Tabulis capitale erat, suspen-
sumque Cereri necari jubebant: gravius
quam in homicidio convictum; impu-

X.

- • • • • The incendiary of a house or of a haystack near a house, if acting intentionally and of sound mind, shall be bound, scourged and put to death by fire. If by negligence, he shall repair the damage, or, if too poor, shall be chastised moderately.¹

XI.

- • • • • A penalty of 25 asses is to be inflicted upon any one who without right has felled the trees of another.²

XII.

- Si nox furtum factum sit, si im occisit, jure cæsus esto.³ Any one committing a robbery by night may be lawfully killed.

XIII.

- • • • • A robber surprised during the day must not be put to death, unless he attempts to defend himself with arms.⁴

XIV.

- • • • • A thief taken in the act, if a free man, shall be scourged and made over by *addictio* to the person robbed; if a slave, shall be scourged and thrown from the Tarpeian rock; but those under the age of puberty shall, at the discretion of the magistrate, be scourged and condemned to repair the damage.⁵

bem prætoris arbitratu verberari, noxi-
amque duplione decerni." Plin., *Hist.*
natur., 18, 8.

¹ "Qui ædes, acervumve frumenti
juxta domum combusserit, vinctus ver-
beratus igni necari jubetur: si modo
sciens prudensque id commiserit; si
vero casu, id est negligentia, aut noxium
sarcire jubetur, aut, si minus idoneus
sit, levius castigatur." Dig. 47, 9, *De*
incendio, ruin., naufr., 9, fr. Gai., lib.
iv. Com. Twelve Tables.

² Plin., *Hist. natur.*, 17, 1. Dig. 47,
7, *Arborum furtim cæsarum*, 1 pr. and
11, fr. Paul. Gai., *Instit.*, comm. 4,
§ 11.

³ Macrob., *Saturn.*, 1, 4. Aul. Gell.,
Noct. attic., 8, 1, and 11, 18. Ulpian.,
according to *Collat. leg. Mos. et Rom.*,

7, 8. Cicero, *Pro Milon.*, 8. Senec.,
Controv., 10, in fine. Dig. 9, 2, *ad leg.*
Aquil., 4, § 1, f. Gai.

⁴ "Furem interdictu deprehensum, non
aliter occidere lex XII Tabularum
permisit, quam si telo se defendat."
Dig. 47, 2, *De furtis*, 54, § 2, f. Gai.;
50, 16, *De verbor. signif.*, 233, § 2, f.
Gai.; and passages in preceding note.

⁵ "Ex cæteris autem manifestis furi-
bus, liberos verberari addicique jussu-
runt (the decemviri) ei cui furtum fac-
tum esset, si modo id luci fecissent,
neque se telo defendissent; servus item
furti manifesti pressos, verberibus affligi
et e saxo præcipitari; sed pueros im-
puberes prætoris arbitratu verberari
voluerunt, noxiamque ab his factam
sarciri." Aul. Gell., *Noct. attic.*, 11,

XV.

* . . . *

The theft *lance licioque conceptum*, discovered by the plate and girdle; (that is to say, when the theft had been discovered, recourse having been had to the solemn search which the law required, in order to obviate the suspicion that the person making the search had himself brought the stolen property to the place, he was clad simply with a girdle (*licium*) for decency's sake, and held in his hand a plate (*lanx*), either that he might put on it the object found, or that his hands being occupied in holding this plate, it could not be supposed he was concealing anything with them), was assimilated to *furtum manifestum*. *Furtum conceptum* was theft by him upon whom the stolen property was found, without recourse being had to the solemn search; and *furtum oblatum* was the theft of him who clandestinely lodged with another that which he himself had stolen, in order that it might be found on his premises and not upon his own. These two latter delicts were punished by a fine of triple the value of the thing stolen.¹

XVI.

Si adorat furto, quod nec manifestum
escit²

In an action for *furtum nec manifestum* . . . (the penalty shall be double the value of the stolen property).

18, and 7, 15. Gai., *Instit.*, comm. 3, § 189. Servius, *ad Virg.*, *Æneid.* 8, line 205, etc.

¹ "Concepti et oblatis (furti) poena *ex XII Tabularum tripli est*." Gai., *Instit.*, comm. 3, § 191. "Lex autem eo nomine (prohibiti furti) nullam poenam constituit: hoc solum præcipit, ut qui quærere velit, nudus quærat, linteo cinctus, lancem habens; qui si quid invenerit, jubet id Lex furtum manifestum esse." Gai., *Instit.*, comm. 3, § 192. In the following paragraph the

jurist, endeavouring to explain the employment of these objects in this ceremony, rather turns it into ridicule than justifies it. Aul. Gell., *Noct. attio.*, 11, 18, and 16, 10. Festus, on the word *Lancos*.

² Festus, on the word *Nec*. Consult Aul. Gell., *Noct. attio.*, 11, 18; Cato, *De re rustica*, in proem. "Nec manifesti furti poena *per legem (XII) Tabularum dupli irrogatur*." Gai., *Instit.*, comm. 3, § 190.

XVII.

- • • • • Provision prohibiting the acquisition by *usucapio*, that is to say, by possession of stolen property.¹

XVIII.

- • • • • Interest upon money lent must not exceed an ounce. That is to say, one twelfth part of the principal per annum (*unciarium fœnus*), which is eight and a third per cent. per annum, calculating according to the solar year of twelve months, according to the calendar of Numa. The penalty for exceeding this interest is the quadruple.²

XIX.

- • • • • For fraud in bailment a double penalty.³

XX.

- • • • • Provision giving all citizens the right of action to remove suspected tutors, and imposing a double penalty for the abstracted property of the pupil.⁴

XXI.

- Patronus si clienti fraudem fecerit, sacer esto.⁵ The patron who shall commit a fraud upon his client shall be devoted to the gods.

XXII.

- Qui se sieri testarier libripensve fuerit, ni testimonium fariatur, improbus intestabilisque esto.⁶ He who has been a witness or acted as scale-bearer and refuses to give testimony shall be accounted infamous, and incapable of giving or receiving testimony.

¹ "Furtivam rem *lex XII Tabularum* usucapi prohibet." Gai., *Instit.*, comm. 2, §§ 45 and 49. Justinian, *Instit.*, 2, 6, § 2. Aul. Gell., *Noct. attic.*, 17, 7, etc.

² "Nam *primo XII Tabulis sanctum*, ne quis unciario fœnore amplius exerceret." Tacit., *Annal.*, 6, 16. "Majores nostri sic habuerunt: itaque in legibus posuerunt, furem dupli damnari, fœneratorem quadrupli." Cato, *De re rust.*, in præm. The signification to be given to these words, *unciarium fœnus*, is nevertheless the subject of a spirited controversy, as may be seen in the author's *Explication historique des Instituts*, t. iii. lib. iii. tit. 17.

³ "Ex causa depositi *lege XII Tabularum* in duplum actio datur." Paul., *Sentent.*, 2, 12, § 11.

⁴ "Sciendum est, suspecti crimen *e lege XII Tabularum* descendere." Dig. 10, *De suspect. tutor.*, 1, § 2, f. Ulp. "Sed si ipsi tutores rem pupilli furati sunt, videmus an ea actione, quæ proponitur *eæ lege XII Tabularum adversus tutorem in duplum*, singuli in solidum teneantur." Dig. 26, 7, *De admin. et peric. tut.*, 55, § 1, f. Tryphon. See Cic., *De offic.*, 3, 15; *De orator.*, 1, 37, etc.

⁵ Servius, *ad Virgil.*, *Æneid.*, 6, line 609. See Dion. 2, 10; Plutar., *Romul.*, 13.

⁶ Aul. Gell., *Noct. attic.*, 15, 13, and

XXIII.					
•	•	•	•	•	Provision ordering false witnesses to be thrown from the Tarpeian rock. ¹
XXIV.					
•	•	•	•	•	Capital punishment for homicide. ²
XXV.					
Qui malum carmen incantasset ³ . . .					(Capital punishment decreed against)
Malum venenum . . . ⁴					any one who practises enchantments or uses poisonous drugs.
XXVI.					
•	•	•	•	•	Provision against seditious gatherings by night in the city, awarding capital punishment. ⁵
XXVII.					
•	•	•	•	•	<i>Sodales</i> , or members of the same college or corporation, are at liberty to make what rules binding upon themselves they may think fit, provided that they do not contravene the law. ⁶

TABLE IX.

PUBLIC LAW (*De jure publico*).

I.

•	•	•	•	•	Provision prohibiting the passing of any law concerning a private individual. ⁷
---	---	---	---	---	--

6, 7. Dig. 28, 1, *Qui testam. fac. poss.*, 26, f. Gai.

¹ "An putas . . . si non illa etiam ex XII de testimoniis falsis poena aboleretur, et si nunc quoque, ut antea, qui falsum testimonium dixisse convictus esset, e saxo Tarpeio deiceretur, mentituros fuisse pro testimonio tam multos quam videmus?" Aul. Gell., *Noct. attic.*, 20, 1; Cicero, *De offic.*, 3, 81.

² Plin., *Hist. nat.*, 18, 3. Festus, on the words *Paricidii quaestores*.

³ Plin., *Hist. nat.*, 28, 2.

⁴ Dig. 50, 16, *De verbor. signif.*, 236 pr., f. Gai., lib. iv. of Commentary

on Twelve Tables.

⁵ "Primum XII Tabulis cautum esse cognoscimus, ne quis in urbe cœtus nocturnos agitare." Porcius Latro, *Declamat. in Catalin.*, c. 19.

⁶ "Sodales sunt, qui ejusdem collegii sunt. . . His autem potestatem facit Lex, pactionem, quam velint, sibi ferre: dum ne quid ex publica lege corrumpant." Dig. 47, 22, *De colleg. et corpor.*, 4, f. Gai., lib. iv. Com. Twelve Tables.

⁷ "Vetant XII Tabulæ, leges privatis hominibus irrogari." Cicero, *Pro domo*, 17; *De legib.*, 3, 19.

II.	•	•	•	•	•	The great <i>comitia</i> , that is to say, the <i>comitia</i> by centuries, have alone the right to enact laws inflicting capital punishment upon a citizen, that is to say, which could deprive him of life, liberty or citizenship. ¹
III.	•	•	•	•	•	The penalty of death is awarded to the judge or arbitrator appointed by the magistrate who accepts a bribe. ²
IV.	•	•	•	•	•	Provision relating to the <i>quæstors</i> in the case of homicide (<i>quæstores homicidii</i>); and the right of appeal to the people in the case of any penal sentence. ³
V.	•	•	•	•	•	The penalty of death decreed against any one who should excite the enemy against the Roman people; or who should deliver a citizen to the enemy. ⁴

TABLE X.

SACRED LAW (*De jure sacro*).

I.	Hominem mortuum in urbe ne sepelito, neve urito. ⁵	The dead must not be buried nor burned within the city.
----	---	---

¹ "Tum leges præclarissimæ de XII Tabulis translatae duæ, quarum altera *privilegia* tollit; altera *de capite civis rogari, nisi maximo comitiatu, vetat* . . . In privatos homines leges ferri noluerant, id est enim *privilegium*, quo quid est injustius?" Cicero, *De legib.*, 8, 19; *Pro Sextio*, 30, etc.

² "Dure autem scriptum esse in istis legibus (XII Tabularum) quid existimari potest? Nisi duram esse legem putas, quæ judicem arbitrumve jure datum, qui ob rem dicendam pecuniam accepisse convictus est, capite punitur." Aul. Gell., *Noct. attic.*, 20, 1; Cicero, *In Verr.*, 2, 32, and 1, 13.

³ "Quæstores constituebantur a populo, qui capitalibus rebus præessent: hi appellabantur *quæstores parricidii*: quorum etiam meminit lex XII Tabularum." Dig. 1, 2, *De orig. juris.*, 2, § 23, f. Pomp. "Ab omni judicio poenæque provocari licere, indicant XII Tabulae." Cicero, *De republ.*, 2, 31. See Festus, on the words *Parricidii quæstores* and *Quæstores*.

⁴ "Lex XII Tabularum jubet, eum qui hostem concitaverit, quive civem hosti tradideret, capite puniri." Dig. 48, 4, *ad leg. Jul. maj.*, 3, f. Marcian.

⁵ Cicero, *De legib.*, 2, 23.

II.

Hoc plus ne facito. . . . Rogum
ascia ne polito . . .¹

Do no more than this. . . . The
wood of the funeral pile shall not be
smoothed.

III.

* * * * *

Restrictions against sumptuous fune-
rals: the dead are not to be buried nor
burned in more than three robes; nor
in more than three fillets of purple;
nor shall the funeral be attended by
more than ten flute players.²

IV.

Mulieres genas ne radunto; neve les-
sum funeris ergo habento.³

Women shall not be allowed to tear
their hair nor make immoderate wail-
ings.

V.

Homini mortuo ne ossa legito, quo post
funus faciat.⁴

The bones of the deceased shall not be
collected for the purpose of giving
him a subsequent funeral (except in
the case of death in battle, or in a
foreign country).

VI.

* * * * *

Provision prohibiting the embalming
the bodies of slaves, funeral banquets,
expensive libations, coronal garlands,
and the erection of incense altars.⁵

VII.

Qui coronam parit ipse, pecuniave ejus,
virtutis ergo duitor ei.⁶

But if the deceased has either personally
or by his slaves or horses obtained
any public trophy, he shall be en-
titled to the honour it confers. (The
crown might be worn during the fu-
neral either by the deceased or by
his father.)

¹ Cicero, *De legib.*, 2, 23.

² "Extenuato igitur sumptu, tribus riciniis et vinculis purpure, et decem tibicinibus, tollit (the law of the Twelve Tables) etiam lamentationem: MULIERES GENAS," etc. Cicero, *ibid.*

³ Cicero, *ibid.* See Festus, on the words *Ricinium* and *Radere genas*. Plin., *Hist. natur.*, 11, 37. Servius, *ad Virgil.*, *Æneid.* 12, line 606. Cicero, *Tuscul.*, 2, 22.

⁴ "Cætera item funebria, quibus lucus angetur, XII sustulerunt: HOMINI, inquit . . . etc. Excipit bellicam peregrinamque mortem." Cicero, *De legib.*, 2, 24.

⁵ "Hæc præterea sunt in Legibus de unctura, quibus servilis unctura tollitur omnisque circumpotatio: quæ et recte tolluntur, neque tollerentur nisi fuissent. Ne sumptuosa respersio, ne longæ coronæ, nec acerræ prætereantur." Cicero, *De legibus*, 2, 24. See Festus, on the words *Murrata potione*. Plin., *Hist. natur.*, 14, 2.

⁶ "Inde illa XII Tabularum lex: QUI CORONAM, etc. Quam servi equive meruissent pecunia partam Lege dici nemo dubitavit. Quis ergo honos? ut ipso mortuo parentibusque ejus, dum intus positus esset, forisve ferretur, sine

VIII.

•	•	•	•	•	Prohibition against more than one funeral, or more than one funeral ceremony, for the same deceased. ¹
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IX.

Neve aurum addito. Quoi auro dentes vincti escunt, ast im cum illo sepelire urereve se fraude esto. ²	Gold must not be buried with the dead ; but if the teeth are fastened with gold, this may be either buried or burned.
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X.

•	•	•	•	•	No funeral pile or sepulchre shall be erected within sixty feet of another man's house, except with his consent. ³
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XI.

•	•	•	•	•	Neither a sepulchre nor its vestibule can be acquired by <i>usucapio</i> . ⁴
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TABLE XI.

SUPPLEMENT TO THE FIRST FIVE TABLES.

I.

•	•	•	•	•	Prohibiting marriage between patricians and plebeians. ⁵
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fraude esset imposita." Plin., *Hist. natur.*, 21, 3. See Cicero, *De legib.*, 2, 24.

¹ "Ut uni plura fierent, lectique plures sternerentur, id quoque ne fieret Lege sanctum est." Cicero, *De legib.*, 2, 24.

² Cicero, *ibid*.

³ "Rogum bustumve novum vetat (lex XII Tabularum) propius sexaginta pedes adjici sedes alienas invito domino." Cicero, *ibid*. See Dig. 11, 8, *De mortuo infer.*, 3, f. Pomp.

⁴ "Quod autem forum, id est vestibulum sepulcri, bustumve usucapi vetat (lex XII Tabularum), tuetur jus sepulcrorum." Cicero, *ibid*; Festus, on the word *Forum*.

⁵ "Hoc ipsum : ne connubium Patribus cum Plebe esset, non Decaviri tulerunt." Livy, 1, 4. See Dion. 10, 60, and 11, 28; Dig. 50, 16, *De verb. signif.*, 238, f. Gai., on lib. iv. Com. Twelve Tables; Cicero, *De republ.*, 2, 37.

TABLE XII.

SUPPLEMENT TO THE LAST FIVE TABLES.

I.	• • • • •	Provision establishing the <i>pignoris capio</i> (the seizure of the security, a species of <i>legis actio</i>) against the debtor for the payment of the purchase-money of a victim, or the hire of a beast of burden when the hire has been expressly made in order that the sum paid should be devoted to purpose of sacrifice. ¹
II.	Si servus furtum faxit noxiamve nocuit. ²	If a slave has committed a theft or any other injury . . . the direct action does not lie against the master, but the <i>actio noxalis</i> does.
III.	Si vindiciam falsam tulit . . . rei si velit is . . . tor (sive litis Prætor) arbitros tres dato; eorum arbitrio . . . fructus duplione damnum decedito. ³	If anyone wrongfully acquires the <i>interim</i> possession of a thing, the magistrate shall appoint three arbitrators to determine the question; and if they decide against him, he shall be mulcted in a sum equal to double the profits.
IV.	• • • • •	It is forbidden to consecrate anything which is the subject of a suit, and a double penalty is inflicted for doing so. ⁴
V.	• • • • •	Abrogates all previous and contradictory enactments. ⁵

¹ "Lege autem introducta est pignoris capio, velut lege XII Tabularum adversus eum, qui hostiam emisset, nec pretium redderet; item adversus eum, qui mercedem non redderet pro eo jumento, quod quis ideo locasset, ut inde pecuniam acceptam in dapem, id est in sacrificium impenderet." Gai., *Instit.*, comm. 4, 28; Dig. 50, 16, *De verb. signif.*, 238, § 2, f. Gai., on lib. vi. Com. Twelve Tables.

² Festus, on the word *Noxia*. "Nam in lege antiqua (XII Tabularum), si servus sciente domino furtum fecit, vel aliam noxam commisit, servi nomine

actio est noxalis, nec dominus suo nomine tenetur." Dig. 9, 4, *De noxal. actio.*, 2, § 1, f. Ulp.

³ Festus, on the word *Vindicia*. Aul. Gell., *Noct. attic.*, 10, 10.

⁴ "Rem, de qua controversia est, prohibemur in sacrum dedicare; alioquin dupli poenam patimur." Dig. 44, 6, *De litigios.*, 3, f. Gai. lib. vi., Com. Twelve Tables.

⁵ "In XII Tabulis legem esse, ut, quodcumque postremum populus jusisset, id jus ratum esset." Livy, 7, 17 and 9, 33, 34.

SECTION XXVII.

CHARACTER OF THE TWELVE TABLES.

114. The law of the Twelve Tables is evidently a compilation in writing of the customary law existing at the time that compilation was made. Details are omitted which were supposed to be familiar to the pontiffs and patricians; principles only are embodied. These at least are the general features of the code, though in certain particulars—as for example the rules for the observance of funeral ceremonies, the laws and obligations existing between neighbours, and the treatment to which the debtor might be subjected by the creditor—it descends into the smallest minutæ. Thus upon twelve tables, roughly engraved and exposed in the Forum, the whole body of the law was inscribed. And, notwithstanding that we possess only a few fragments, we can, by collecting the indirect notices and allusions scattered through the works of different old writers and jurists, discover in these tables the germ of a large number of those institutions which were developed by later law, and we can readily understand how it is that the Twelve Tables were at all times regarded by the Romans as the basis of their civil rights.

115. Notwithstanding the fact that the decemvirs appear to have had before them documents containing foreign laws, and especially the laws of Athens,—notwithstanding the fact that they have introduced certain provisions pointed out by writers and jurists as *verbatim* transcripts, and whose resemblance in certain particulars can neither be attributed to accident, nor to the fact of similarity between Roman and Grecian thought,¹—we are nevertheless justified in asserting that the law of the Twelve Tables is the Quiritarian law, the law of the men of the lance, that it was peculiar to Roman citizens, and that it is radically different from the law of other nations.

116. The political constitution of the city is not explained

¹ See passages cited above in note to Table VII.

by anything which the fragments, as we possess them, contain. The division and the distribution of the people, the organization and the powers of the *comitia* by curies, by centuries, and by tribes, the consulate, the senate, and all the other public functionaries, do not appear to have been dealt with by these legislators. All this organization constituted a machinery that was allowed to work in its ordinary way. The subject to which the attention of the legislators who compiled the tables was directed were those public disputes which required immediate settlement. The prohibition of class legislation, the principle that it was the final decision of the people which should be law, and which should have the force of precedent, the exclusive power of the great *comitia* to determine questions affecting the citizens capitally, and the right of appeal to the people, that is to say, to the great *comitia*, in matters of equal importance, are among the provisions which most directly affect the political constitution of Rome. As to the rest, the public law does not occupy a leading position in the code of the decemvirs. It is described, together with sacred law, in the ninth and tenth Tables, that is to say, in the two last Tables compiled by the first decemvirs. As to the extent to which that principle of equal laws for all classes (*æquanda libertas omnibus, summis infimisque jura æquare*), for which the plebeians contended, was admitted by the decemvirs, and recognized in the Twelve Tables, we cannot speak with accuracy, because we are not acquainted with all the shades of difference which separated the two classes prior to this code.

But it is clear that neither in public nor private law did the Twelve Tables introduce complete equality between patricians and plebeians. The exclusive right of the patrician to the administration and to the possession of high offices still subsisted; clientage, which was attended with so many important consequences, is consecrated by the law of the Twelve Tables; and the absence of the *connubium* between the patricians and plebeians shows clearly that these classes were still two distinct classes.

117. That which most forcibly strikes us in connection with

the Twelve Tables is that they contain the law of a people prone to litigation. The summons of the adversary before the magistrate, the rules governing the legal suit and the rights of the creditor over his debtor, that is to say, the commencement, the intermediate steps, and final execution, are matters which occupy the first place, and in fact they comprise the first three Tables. The form of procedure up to appearance before the magistrate (*de in jus vocando*) is simple and rude. The plaintiff, when the defendant refuses to follow him, takes witnesses, seizes the defendant, and drags him before the magistrate. The entire proceeding and the administration of justice was public. Any quarter of the forum might serve as a tribunal, but more especially that part known as the *comitium*, which was covered with a roof, and in the middle of which was the *rostrum*.

We find already in the Twelve Tables that characteristic and important distinction drawn by the Roman law between *jus* (the law) and *judicium* (the action at law), or the difference between the magistrate (*magistratus*) and the judge (*judex* or *arbiter*). The first (*magistratus*) was charged with declaring the law (*jurisdictio*) and with its execution, aided by the public authority (*imperium*), with organizing the suit by the accomplishment in his presence of all the solemn rites prescribed by the law or by custom, and by appointing a judge in those cases which he did not himself think fit to determine. The second (*judex* or *arbiter*) was charged with the duty of adjudicating upon the dispute referred to him by the magistrate. This difference will be seen at a later period fully developed. But the *in jus vocatio*, that is, the summons before the law, in other words, before the magistrate, appears as early as the date of the Twelve Tables (T. XII. § 3).

118. The provisions of the laws of the decemvirs as to the rights of creditors over the person of their debtors bear strong testimony to the troubles of the plebeians in these early days and to one source of political agitation. We may remember, that it was one of the decemvirs, Appius Claudius, who impudently designated the prison which he had caused to be con-

structed for his debtors the home of the Roman plebeian?¹ With such laws in existence we cannot be surprised that debt should have been more than once the cause of revolution. However, it is easy to recognize, in the care that the decemvirs took to regulate and to legalize the rigours to which the debtor was liable, the result of scarcely suppressed rebellion. The limit of rate and interest and the pains pronounced against those who exceeded it, the delay of the thirty days for the condemned debtor, the presence of the magistrate, the *vindex*, or of the respondent who could claim the debtor, the limitation of the weight of the chains, the regulations as to the food to be supplied, the second delay of sixty days, the obligation to produce the captive before the magistrate three times, during this interval, in public, and on the market-day, together with the proclamation as to the sum owing, in order that the parents and friends of the debtor, or any who had compassion on him, might take measures to discharge his debt and save him from the fate which awaited him, are all concessions or guarantees made or given to the debtor.

But after all these formalities had been gone through, if the debt was not paid the debtor might be put to death or sold into a foreign country, in order that the city might be freed from him. In the case of there being several creditors, they might divide his remains between them. Modern writers have refused to read this provision in its true and literal sense; they have sought in it a symbol, and regarded the partition as being that of the possessions and not of the body of the debtor; but the ancients, as fragments from Aulus Gellius, from Quintilian, from Ter-tulian show us, read this law literally:² they, in fact, justified the Roman law in saying that custom indeed repudiated the practice, but that the law was intended as a means to secure payment of the debt as the result of fear, and that it was in no instance put into execution.

119. The two Tables which follow, that is to say, the fourth and fifth, present to us the system of the Roman family and the

¹ Livy, lib. iii. § 57. "Et illi carcerem edificatum esse, quod domicilium plebis

Romanæ vocare sit solitus."

² See note to Table III. § 6.

rights more directly connected with it, such, for example, as inheritance, tutelage, curatorship.

The Roman family (*familia*) is not a natural family: it is a civil creation of the Quiritarian law. The civil marriage, the Roman nuptials, is indeed an important element, but it does not constitute a fundamental principle. The Roman family is based not upon marriage, but upon power. The head (*pater familias*) and the persons subject to his power, slaves, infants, wife, freemen acquired or engaged by emancipation (*mancipati, nexi*), or adjudged to him by the magistrate (*addicti*), are what we must understand by the word *familia*. In one of its significations, in a still more extended sense, and one frequently employed in the Twelve Tables, it includes also the entire patrimony, all the property of the chief both persons and things; while in a third and in a more limited sense, it simply designates the chief, with his wife and the children under his power. There is thus considerable elasticity in the signification of this word *familia*.

120. It is doubtful whether the three terms which indicated three kinds of power possessed by the head of the family—*potestas*, that over the slaves and children—*manus*, over the wife—and *mancipium*, over freemen (*mancipes* or *addicti*)—were in use at the time of the Twelve Tables. This may be doubted, especially as to the first of these expressions, *potestas*, the construction of which indicates a more recent date.

121. The provisions of the Twelve Tables relating to the acquisition by the husband of the wife, from the fact of possession for one year (*usu*), proves that we must take the greatest care, in dealing with this period, not to confound the terms indicating marriage, *nuptiæ*, *justæ nuptiæ*, *justum matrimonium*, and the marital power, *manus*. Marriage itself and the form of marriage were questions which were left entirely to the discretion of individuals, without any legal compulsion of any kind; nor did the law require the intervention of any authority or of any public ceremony. The mutual consent of the parties, consummated by the tradition or delivery of the woman, was all that

was necessary, that is to say, to place her at the disposition of her husband.¹

It was a transaction primitive in its simplicity, but savouring of rough justice; it was disguised under the garb of symbolic ceremonies devised to meet the taste and feelings of the people, but which were in no way a necessity of the law.

However, as mere transfer did not suffice to give Quiritarian property in any human being, a marriage thus contracted did not place the woman under the hand (*in manu*), that is to say, in the power, of her husband. In order to produce this effect it was necessary that the nuptials should be contracted according to the patrician formula of the confarreatio, or that the woman should be transferred *per as et libram* to her husband; otherwise the same law that existed in reference to personal property prevailed at the end of one year's possession (*usu*), with this peculiarity that the Twelve Tables provided for the woman a peculiar method of defeating this usucaption. This is why it is said marital power was acquired in three different ways, by *confarreatio*, *coemptio* and *usus*. The woman thus acquired by her husband (*in manu conventa*) no longer belonged to the family of the chief to which she originally belonged, but passed into that of her husband, in which she ranked as his daughter, and was in the position of sister to her own children.

122. The mere tie of blood relationship was of no account among the Romans. They used the words *parens*, *parentes*, in the strict sense of "begetting," and not as the English, who apply the term both to father and mother, nor as the French, who include in it the whole relations; they indeed confined this term to one signification of the word *parere*, viz., to beget, in which sense it must be understood by us. The most general

¹ Marriage in my opinion, contrary to that generally received, was among the Romans not a purely consensual contract, which is proved by the fact that consensual contracts could be made either by letter or by messenger, and this was not the case with marriage. This could not take place in the absence of the woman, because in addition to

consent, it required tradition or delivery; whereas on the other hand it might be made in the absence of the man, if the woman was by his consent, however expressed, taken to his house.

(See this subject treated at length by the author in his second volume of the Commentaries upon the Institutes, lib. i. tit. 10.)

expression and the most comprehensive term indicating relationship in Roman law is *cognatio*—the cognation, that is to say, the tie between persons who are united by the same blood or those reputed by the law as such (*cognati; quasi una communiter nati*). But cognation alone, whether it proceeds from legal marriage or any other union, does not place the individual within the family, nor does it give any right of family. The civil law takes no cognizance of it unless it be for the prohibition of marriage. The relationship of the civil law, that which produces civil effects, and confers the right of family, is the agnation (*agnatio*), the tie uniting the cognate members of the same family; and the real bond of their union (*ad-gnatio*) is the paternal or marital power which unites or which would unite all belonging to one common ancestor if the same remote ancestor of the family was still in existence. Therefore, whoever was subject to this power was agnated and belonged to the family; whoever was released from this bond was no longer an agnate, nor did he belong to the family. The same rule held good both as to the wife and the sons, as well as to the daughters, the brothers, the sisters, and all others. As soon as the head of the family died, the family was broken up into a number of small families, each son, who had thus become independent, being the head of a distinct family; but the tie of agnation still existed and continued to exist between these different independent families, and even attached to new members who might be subsequently born. So that all the members of the family as well as their descendants remained attached to the original head of the family, and collectively bore the name of the *familia*. Thus we have a new and very extended acceptance attached to this term.

123. In addition to agnation, the law of the Twelve Tables treats of gentility (*gens*, or, in other words, *generation, genealogy*). In order thoroughly to understand this relationship, which is purely of Quiritarian origin, we must keep steadily in mind the ideas connected with clientage and enfranchisement. (See § 17.)

The citizens, the issue of the common stock, whose ancestry

had always been *ingenui*, that is to say, who could trace a line of ancestry among which there had not been a single member tainted with vassalage or clientage in any form whatever, and who consequently carried on from generation to generation their own lineage, and who were united by the ties of civil relationship, constituted collectively a *gens*. They were as to each other both agnates and gentiles. Under this aspect one does not see clearly, if it was this condition which constituted the *gens*, wherein gentility differed from agnation, that is to say, the condition under which no one in the whole line of ancestry had ever been in a state of servitude or clientage. For this was in primitive times an exclusive privilege of the patricians, and all the earlier plebeians were clients. So that in this point of view the gentility in earlier periods would have been the agnation of the patricians, and the *gens* would have been the patrician *familia*: but in addition, these patricians, at the same time agnates and gentiles as to each other, were also gentiles of the entire family of the clients or enfranchised, who were derived by civil process from the *gens*, and who had taken their name and adopted their religious rites (*sacra*), and to whom their *gens* was a civil genealogical stock. These descendants of the clients or enfranchised had gentiles, though they belonged to no one, and in relation to them the agnates are totally distinct from the gentiles. Their agnation was founded upon a common tie of parental or marital power, from whatever period this dated. The gentility to which they were attached depended on the bond arising out of the power of patronage, whether of client or enfranchised, without reference to the period when that power originated.¹

Thus the two systems were successively developed. As to that of gentility we have two distinct races, the superior race that of the gentiles, derived from a stock which had always

¹ Notwithstanding the fact that the origin of gentility is represented as exclusively belonging to the patricians, yet the great families of the plebeians at a subsequent period, never having been in a condition of clientage, and themselves boasting a lineage perpetually *ingenuus*, or free from taint of

vassalage, were also in the course of time able to form a *gens*—a race of gentiles in the first place among themselves, and afterwards by relation, not to the descendants of their clients because they never had any, but to the descendants of the enfranchised.

been noble and pure from any taint of vassalage, and the race of the clients and enfranchised with their descendants. This was an inferior and derivative race, reckoning the *gens* as its source, so that it had a kind of artificial lineage, deriving its existence and its name from the operation of civil law. Hence the term *gentilhomme*, *gentiluomo*, *gentilhombre*, *gentleman*, which has been perpetuated even to our own times throughout the modern languages of Europe, indicates what we understand by a good extraction, a noble genealogy, a pure blood—*gentilis homo*, as Cicero aptly styles it. (Pro Domo, § 49.)

124. Thus we must distinguish three terms which express the ties of civil or natural relationship amongst the Romans. 1st. The family (*familia*), to which the term agnation corresponds (*agnatio*), and the title of agnates (*agnati*); 2nd. The *gens*, to which corresponds the "gentility," the title of gentiles (*gentiles*); and 3rd. The cognation (*cognatio*), to which corresponds the title of cognates (*cognati*). The two former are Quiritarian, depending upon the tie of paternal or marital power, or the patronage of the client or enfranchised; the third being purely natural, based simply upon the ties of blood and unattended by any civil effects.

125. It is upon these relations of agnation or gentility, and upon this construction of the family or artificial lineage, that all the civil rights of inheritance, tutelage and curatorship depend. Any one belonging to the civic family participated in those rights and continued to do so until he had been removed from it, and had been freed from the power lodged in the hands of the head of such family. And this applied equally to son, father, mother, brother, sister or any other relation.

Thus the stranger introduced into this family by adoption, or the wife by *confarreatio*, by coemption, or by *usus*, acquired all the privileges of agnation and of gentility, provided that the introduction was into a family of gentiles. But no right belonged to a son, or to a daughter, or to their descendants, who had left or had been removed from the family by the chief; no right attached to relations of any description on the female side, be-

cause they did not enter into the family of their mother; and, finally, no right accrued to the mother as against her children, nor to the children in respect to their mother, except as they were attached to the family by the lien of marital power.

126. The following is the order of succession fixed by the law of the Twelve Tables:—

1. CHILDREN.—Upon the death of the chief, the children who were under his *potestas*, and these included his wife, that is to say, if she was *in manu*; in fact all those who composed his private family, who were his instruments, his representatives, and, in a certain sense, co-proprietors with him of the common patrimony. Thus in the language of the old Roman law, as in that of the Twelve Tables, they were called *hæredes sui*, inasmuch as they took an inheritance which in fact belonged to them.

2. AGNATES.—In default of private family, the great family succeeds in the person of the nearest agnate.

3. GENTILES.—And, lastly, in default of *agnati*, the nearest gentile took the inheritance (that is to say, if it was a question of the succession to a descendant, client or enfranchised). For there being no *agnati* it was necessary to pass on to the *gens* from which the lineage had been derived, from which the stock had taken its name, and whose *sacra* had been adopted: the nearest member of the *gens* was therefore the heir.

It is remarkable, considering that we are dealing with a society essentially aristocratic, that neither the Twelve Tables nor the custom to which they owe their origin, conferred any privilege either of sex or primogeniture in the division of an inheritance. The inheritance was divided equally among all entitled to it who were in the same degree.

127. The principle that the testamentary act of the head of the family should have legal force was an important advantage gained by the plebeians, who had to adopt a stratagem in order to secure it. While, on the one hand, the patrician caused his will to be sanctioned by the assembly of curies, the plebeian was forced to resort to a subterfuge, and by a fictitious sale, *per æs et libram*, to dispose of his patrimony prospectively.

Thenceforth the transaction acquired the validity of public law; and, indeed, in the formula of this fictitious sale words were inserted to show that the testator only exercised a right given to him by law. "*Quo tu jure testamentum facere possis secundum legem publicam.*"¹

128. We may also remark, that Tables IV. and V. lay down the following :—

1. The rule that the inheritance is divided as of right amongst the heirs.
2. The origin of the action *familiæ erciscundæ*, that is to say, the division of the inheritance.
3. And, thirdly, the social position of women, the subjection in which they were constantly held either by their ancestors or husbands, and their position in perpetual tutelage. There was no exception save in the case of vestals.

129. The fragments which we possess of Tables VI. and VII. furnish the rules as to property, its rights and obligations.

The Romans had substituted for a natural marriage a civil marriage (*justæ nuptiæ*), for a natural relationship a civil connection (*agnatio, gens*); they also substituted for ordinary possession, civic proprietary rights (*mancipium*, subsequently called *dominium ex jure Quiritium*). In place of the ordinary transaction of alienation by sale, they substituted a sale and an alienation peculiar to Roman citizens (*mancipium*, afterwards called *mancipatio*), and finally, in place of ordinary contracts, civil engagements (*nexus* or *nexum*). Thus the status of the citizen was impressed upon his marriage, upon his relationship, upon his property, upon his sales, upon his contracts; and imparted to all these transactions and conditions the peculiar characteristic which is the life of these institutions. The Twelve Tables, and especially the sixth and seventh, are stamped with this character in their mode of dealing with property and obligations.

¹ Gai., *Instit.*, comm. 2, § 104.

130. Among the Romans, ownership, which was rendered more fixed and permanent by this characteristic, could not be put an end to, or transferred from one citizen to another, except under certain restrictions sanctioned by the law, and in the greater number of instances accompanied by certain peculiar and solemn forms. Strangers could not acquire it. A man was either a proprietor according to Quiritarian law (*dominus ex jure Quiritium*), or he was not a proprietor at all. There was no intermediate status. Among the Quiritarian modes of acquiring Roman property, we find distinctly expressed in the Twelve Tables *mancipatio* or alienation *per æs et libram*—this we place in the first rank; then the testamentary law of testators (*lex*); then continuous possession (*usus auctoritas* afterwards called *usucapio*); and finally the *in jure cessio*, or more generally the declaration of the magistrate (*addictio*). As to the adjudication of the judge (*adjudicatio*), it can also be recognized, though less formally stated, in the fragments that are extant, in the action brought to secure the right division of the inheritance (*familiæ erciscundæ*), or for the limitation of boundaries (*finium regundorum*), both of which were incontestably of as early an origin as the Twelve Tables. There can be no doubt that uninterrupted occupation and capture from the enemy were a recognized means of obtaining Quiritarian property. In fact, the latter was necessarily the origin, the very type of Quiritarian right, for the Quirites were “men of the lance,” and the lance was the symbol of their power. And it is certain, that, in the earliest times, mere tradition sufficed to confer Quiritarian ownership in a great number of cases.

131. In effect the law of the Twelve Tables, according to Gaius, contains the division of things into *res Mancipi* and *res nec Mancipi*. As to things *Mancipi*, Quiritarian ownership impressed a certain character upon them which did not modify the ownership, but imparted to it the element of permanency. It was indeed acquired and lost with greater difficulty. Thus, in the first place, mere consent and tradition were insufficient to transfer from one citizen to another the dominion of things *Mancipi*. If it was desired to effect this change immediately,

it was necessary to have recourse to a religious ceremony, generally mancipation. On the other hand, things *nec Mancipi* were not susceptible of mancipation, and the ownership in them was passed by mere tradition. In the second place, the alienation of things *Mancipi* was not permitted in all cases, where that of things *nec Mancipi* was lawful. Thus the law of the Twelve Tables prohibits a woman, under the tutelage of her agnates, from alienating anything *Mancipi* without the authority of her tutor: such property could not be alienated from the family without the consent of the agnates, whereas a woman was free as regarded things *nec Mancipi* to dispose of them at will.¹

Apart from mancipation, all the other methods of acquiring Quiritarian ownership were common both to things *Mancipi* and *nec Mancipi*.² The only transaction in regard to which the two classes of property differ from each other is mancipation, and for this reason they are called severally *res Mancipi* or *Mancipii*, and *res nec Mancipi* or *Mancipii*, things that may be mancipated and things that cannot be mancipated.³

132. The incidents therefore of things *Mancipi* are those characteristics which naturally attach to them. They must therefore be amenable to the civil law, because they involve a judicial act essentially Roman, and this excludes all foreign soil as well as every other foreign object; it must be capable of being seized by the hand, for this is the formality which constitutes the mancipation (*manu capere*); this, therefore, excludes all incorporeal things, except, indeed, some of the more ancient servitudes, *e. g.* rural servitudes, which being connected with agriculture were identified with the land itself; and except the patrimony and all incident to it (*familia*), which were included by a pure fiction; and, finally, it was necessary that it should have a distinct individuality in order that those citizens who took part in the judicial act, and who were called upon as witnesses to the acquisition of the Quiritarian rights in the matter, should be able to testify as to its identity. But these peculiar characteristics

¹ *Gal., Instit.*, comm. 2, § 80. *Ulp., Regul.*, 11, § 27.

² *Ulp., Regul.*, 19, §§ 8, 9, 16 and 17.
³ *Gal., Instit.*, 2, § 24.

are only found in a sufficient degree for the purpose of mancipation in two classes of objects,—in the land, and in animate beings, freemen, slaves, and animals; and amongst the latter are those only that have been tamed by man and associated with him in his labours, because those only in fact possess as to man a recognized individuality. If destined for other occupations, or if wild, their identity is less distinct and their utility less great. Thus Roman land, men and beasts of burden constituted *res Mancipi*. The things *Mancipi* belonging to the head of a primitive Roman family were his Quiritarian land, together with the house which was incorporated with it, and the rural servitudes thereunto attached, his wife, his children, men subject to his control, and his beasts of burden, things whose individuality was connected with his own, and which at the same time in those primitive periods were the most valuable, and which could not be separated from him by simple transfer, and to which the religious act of mancipation was exclusively applicable. When with the growth of civilization the cultivation of the arts and the luxuries of life spread among the citizens, wealth increased, and large private fortunes were amassed, foreign animals were indeed introduced for purposes of draught and burden (*elephanti et cameli; quamvis dorso colloves dumentur*). But *res Mancipi* were not increased in number. The characteristic was stamped upon them by the ancient Roman law, and this could not change.¹

133. The relations existing between contiguous proprietors were regulated even as to the smallest minutiae in the fragments which we possess. We also learn from these fragments the existence of certain servitudes, amongst which the most important is the right of way (*via*), which was therefore of earlier date than the Twelve Tables.

134. The theory of obligations, especially those springing from contract, is one of the points upon which the fragments of the Twelve Tables furnish us with but few data. The name *obligatio* is a more modern expression belonging to the legal

¹ Ulp., *Regul.*, 19, § 1. Gai., *Instit.*, 2, §§ 25 et seq.; §§ 102 and 104.

phraseology of a period posterior to the decemviral law. The same must be said of the term "contract" (*contractus*). But by whatever name it was known, we see clearly in the Twelve Tables the existence of obligation resulting from torts (*noxæ*), and from certain peculiar provisions of the law, as in the case of co-heirship, legacies, tutelage and the relation between neighbours. The mode of contract amongst Roman citizens was the *nexum*, that is to say, the transaction better known by the term *per æs et libram*,¹ that which served to transfer the Quiritarian ownership. The solemn words pronounced by the contracting parties constituting the law which bound them respectively (*nuncupatio*), according to the expression found in the Twelve Tables, were *ita jus esto*.² This was the law of mancipation (*lex Mancipii*); and whether it was real or purely fictitious, the alienation *per æs et libram* was necessary to bind the respective parties. In this manner even deposits and pledges were made.³ It was in this manner that the borrower bound himself to the lender, and not unfrequently pledged his person to satisfy his debt (*nexa*). At a later period the civil forms of the Roman law were simplified, and the different acts of the ceremony *per æs et libram* were taken as performed, the words, detached from the acts which formerly accompanied them, being alone preserved. The transaction thus came to consist of the solemn interrogation (*sponsio, stipulatio*), followed by the appropriate response, or the parties contented themselves with a simple entry in the domestic register of the sacred terms suited to the transfer in question (*expensilatio*). Thus the two civil forms of contract *verbis* and *litteris* among the Romans were derived from a simplification of the ancient contract *per æs et libram* of the *nexum*. There is nothing in the Twelve Tables to indicate to us the existence of the contract *verbis* or of the *stipulatio* at that period, notwithstanding the fact that traces are to be found in earlier historians of the interrogation and answer; nor do the Twelve Tables furnish us with any clue to the contract *litteris*.

¹ "Nexum est, ut ait Gallus Ælius, quodcumque per æs et libram geritur, idque necti dicitur." Festus, on the word *Nexum*. Varro, *De ling. lat.*, 6, § 5

² See Table IV., f. 1 and 2.

³ Gai., *Instit.*, 1, § 122, and 2, § 69. Festus, on the words *Nexum* and *Nuncupatio*.

135. We cannot, however, doubt that the ordinary sale, without the solemnity *per æs et libram*, did in fact exist and was practised legally at this period. Indeed, we have clear proof of this fact from those passages in the Twelve Tables which provide that after certain delays the debtor (*addictus*) should be put to death or sold to a foreigner across the Tiber, which must have reference to the form of sale common to all people, and not to the Quiritarian alienation, inasmuch as it took place with a foreigner. We also see it in the provision which states that the property in a thing sold and delivered does not vest in the buyer till payment, which must of necessity refer to a sale other than that by mancipation and to a sale of things *nec Mancipi*. Indeed, as regards the great mass of things which were not capable of mancipation and which were of daily and hourly use, sale was a necessity and must have been constantly practised, though it does not appear at this primitive period of Roman history except as a fact accomplished by one or other of the parties, and this is proved by its ancient name *venumdatio*, "the being given in sale." Simple consent or simple voluntary accord of the parties produced no obligation recognized by the then civil law. It required time to develop the Quiritarian law to that point which would enable it to admit the principles of the *jus gentium* and to adopt contracts based solely upon consent.

136. The rules concerning torts in the eighth Table are characterized by features common to the legislation of all rude people still in their infancy,—the interest of the individual predominating over that of the state, penalties more frequently of a private than a public character, and their transmutation into a species of ransom and the resolution of criminal proceedings into a simple pact. When punishment was inflicted for public crimes the penalty assumed the form of torture, on the principle of retaliation: the victim was doomed as a sacrifice to Ceres, or to some other deity; or condemned to leap from the Tarpeian rock, or to torture by fire or by the leather sack, all being out of proportion to the crime. This was the result of ignorant superstition, as in the case where the punishment of death was

awarded for making use of enchantments, to blight the harvest or transfer crops from one field to another.

137. The ancient name for a tort was *noxæ*, which was a kind of obligation resulting from something done by one man to the prejudice of another, whether intentionally or inadvertently, provided that it was wrongful. The fragments of the Twelve Tables present us with three distinct examples: theft (*furtum*), damage (*damnum*), injury (*injuria*).

138. We have already commented upon public and sacred law as treated in the ninth and tenth Tables.

139. As to the last two Tables, the eleventh and the twelfth, which were intended as a supplement to what went before, Cicero is far from speaking of them with the same admiration as he bestows upon the others. In his Republic he says, "*Qui (the last decemvirs) duabus tabulis iniquarum legum additis, quibus etiam quæ disjunctis populis tribui solent, connubia, hæc illi ut ne plebei cum patricibus essent inhumanissima lege sanxerunt.*" They added two Tables of iniquitous laws, by which marriage, which is ordinarily permitted even between persons of different countries, was prohibited by the most odious of laws between the plebeians and the patricians.¹ It was probably under the influence of the impression produced by this prohibition of marriage between the two castes, that Cicero applies to the contents of these Tables the epithet "iniquitous;" but if all had merited this epithet, how was it they were adopted by the people, especially when we have regard to the fact of the expulsion of the decemvirs?



SECTION XXVIII.

ACTIONS OF THE LAW (*Legis Actiones*).

140. The law, it is true, is written, but besides abstract rule public power is necessary in order to give it force, and a pro-

¹ Cicero, *De republ.*, lib. ii. § 37.

cedure adapted to put it in operation is indispensable. There must be, together with a law, a judicial authority and a judicial procedure. The Quirites, "men of the lance," had in their judicial customs, even anterior to the promulgation of the Twelve Tables, forms of procedure assimilated to acts of violence and to the combat, in which we at once see their predominant characteristic, the military life, and the important part played amongst them by their favorite instrument, the lance; as also the predominance of the sacerdotal and patrician elements, which had regulated the forms, and which had preserved in symbols and pantomimic action the realities of former days. The Twelve Tables have in some of their provisions treated of these forms of procedure as they then existed. They allude to them as institutions then in full force, but do not prescribe any rules or formulas concerning them.¹

This duty devolved upon the college of pontiffs, which was confined to the patricians, to which caste was confided the exclusive juridical and judicial power. However, in the presence of the Twelve Tables, which had given a written law and laid down a permanent system, it became indispensable to provide a procedure suited to and in harmony with the new code. This is why the national historians inform us that immediately after the passing of the Twelve Tables a second effort was made to prescribe regulations for the form of procedure or the actions of the law (*legis actiones*);² so called, says Gaius, either because they were a creation of the civil law, and not of the prætorian edict, or because they were prepared to suit the provisions of the law (*legum verbis accommodatæ*).³

141. The term *action*, at this period, is a generic designation which signifies a particular form of procedure, the procedure taken as a whole, including the ceremonies, the acts and the words which constituted it.

¹ See especially Table II. f. 1, and Table XII. f. 1.

² "Deinde, ex his legibus, eodem tempore fere, actiones compositæ sunt, quibus inter se homines disceptarent: quas actiones, ne populus prout vellet

institueret, certas solemnesque esse voluerunt: et appellatur hæc pars juris *legis actiones*, id est legitimæ actiones." Dig. 1, 2, *De orig. jur.*, 2, § 6, f. Pompon.

³ Gai., *Instit.*, 4, § 2.

At the period of the Twelve Tables there were only four actions; one more was subsequently added. Of these four actions two are forms of procedure instituted in order to arrive at a decision of the point in dispute, the other two are forms of procedure used to put the judgment into execution.

Of the first two—first is the *actio sacramenti*, the most ancient of all, which, with certain variations of form, was employed in suits whether to enforce obligations or in suits relating to rights of property or other real rights, the predominant characteristic in all cases consisting in the *sacramentum*, or sum of money which each litigant had to deposit in the hands of the pontiff, and which was forfeited by the unsuccessful party for the benefit of public worship. It is concerning this form of action that we have the most information, and we know that the Twelve Tables fix the amount of the *sacramentum*.¹ And, secondly, the *judicis postulatio*, which was an application made to the magistrate calling upon him to appoint a judge to try a given case without having recourse to the *sacramentum*, and was consequently a simplification of the procedure which was admitted in certain cases.²

Of the last two—first the *manus injectio* (the putting on of the hand), the corporeal seizure of the person of the debtor when either condemned by the judge or surrendered by himself in default, as the result of which the debtor was *addictus*, that is, adjudged to his creditor by the prætor;—the second, the *pignoris capio* (the taking a pledge), or seizure of the property of the debtor, concerning which also we know that there was a specific provision in the law of the Twelve Tables.³

142. The *actiones legis* were completed *in jure* before the magistrate, and this was the case even when it was necessary for him to appoint a judge. This was the form, the preliminary step. There is no exception, save in the case of the last, *legis*

¹ See Table II. § 1, and note 1. Festus, on the word *Sacramentum*.

² This was especially provided for in the Twelve Tables (vide Table VII. § 5). It is supposed that the formulæ

of this section was contained in these words: J. A. V. P. U. D. (*judicem arbitrumve postulo uti des*). Valerius Probus.

³ Vide supra, Table XII. § 1.

actio, the *pignoris capio*, and indeed it was a question with the jurists whether the *pignoris capio* was in fact a *legis actio*.¹

143. But notwithstanding the fact that the *sacramentum* and the *judicis postulatio* were generally forms for the enforcement of all substitution of rights, and that they had in all cases a certain uniform characteristic, however much the details and the necessary formulas adapted to each individual case might vary in each instance according to the nature of the law or according to the provisions of the law upon which the right was based, it was necessary that the parties should be familiar with the acts and formulas suited to their particular case.

144. Such was the early system of procedure amongst the Romans. Its characteristic is symbol; it is here that we find the lance (*vindicta*), the tuft of grass, the tile, and the other material representations of ideas or of objects. It is here that we find the gesture, the legal pantomime, the simulated act of violence, the fictitious combat (*manum consertio*), for the most part symbolizing the transactions and processes of an earlier and barbarous period: here we find the utterance of sacred terms, and he who should be so unfortunate as to say "vine" (*vites*), in an action concerning "vines," instead of using the word *arbores*, which was the religious term peculiar to the law of the case, would lose his action:² here we find the impress of the sacerdotal finger; we see it in the *sacramentum*, the preliminary deposit of a sum of money in the hands of a pontiff for the benefit of public religious service; we see it in the *pignoris capio*, accorded subsequently on occasions in which religious sacrifices were concerned, and it is here that we find the weight of patrician influence. The magistrate was a patrician; the judge could only be selected from the order of patricians; in one word, the *jus* and the *judicium* were in their hands.

145. The first and the principal of these actions, the *actio sacramenti*, in those forms which related to the vindication

¹ Gai., *Instit.*, §§ 26, 29.

² Gai., *Instit.*, 4, §§ 11 and 30.

(*vindicatio*) of a thing or of a real right, had been diverted from its original intention and by custom came to be employed in a manner purely fictitious, in order to arrive at certain results which were not authorized by the civil primitive law or suited to a more complex state of things. The ingenious spirit of this fiction exhibited itself when it was desired to transfer a thing or real right which was not actually in the possession of the party desirous of making the transfer. A fictitious action was in such cases brought before the magistrate (*in jure*) by the party who claimed as his own the object which was intended to be transferred to him. The party against whom the action was brought, that is, the person who wished to transfer the property, raised no objection to the plaintiff's claim, whereupon the magistrate pronounced in his favour, and adjudged (*addebat*) the object to the claimant. This is what was known as the *cession* before the magistrate (*in jure cessio*), which existed even before the time of the Twelve Tables, but which was confirmed by them in the provisions to which we have already referred.¹ The enfranchisement before the magistrate (*manumissio vindicta*), the emancipation (*emancipatio*), and the adoption of the sons of a family, the transfer of the tutorship from one person to another, a means employed by women in order to place themselves under tutors less severe than their agnates, are but peculiar applications of this process *in jure cessio*; and it is for this reason that these actions are frequently styled even by the Roman jurists actions of the law or legitimate actions (*actus legitimi*), though they were but simulations of certain formalities belonging to one of these actions.

146. But these forms, and especially the sacred words of the *legis actiones*, specifically applied to the object or cause of each demand, were not made public, and were only known to the patricians, who had composed them or who were in the habit of using them. The college of the pontiffs was charged with their safe keeping. An action could only be commenced upon certain given days named *fasti*: the knowledge of these days

¹ See Table VI. § 11.

was possessed only by the pontiffs, who were charged with the necessary intercalations of the calendar. In this way every private individual had to rely upon the pontiffs and upon those in high position, and to them it was necessary to have recourse whenever he found himself in difficulty. Add to this the fact that the laws of the Twelve Tables, laconic and obscure as they were, required to be explained and adapted by interpretation to the different cases which they had not specifically comprised; that the patricians alone were versed in the study of these laws; that they alone held high magistracies, and that to them belonged the sole right to manage the various cases; and the conclusion is forced upon us that even after the promulgation of the Twelve Tables the patricians, as to all that concerned civil rights, still preserved an exclusive and predominant influence.¹

147. We may here conclude the discussion upon the time which had elapsed since the expulsion of the kings. In this short interval both public and civil law have assumed a new aspect. We find the patricians and the plebeians residing together in the same city: the former have their magistrates, their consuls and their quæstors; the latter also have theirs, their tribunes and their ædiles. All the influence that springs from nobility of birth, from sacerdotal functions, from high position in the army, from the *éclat* attending victories, from knowledge of politics and the laws, is on the side of the patricians. The weapons in the hands of the plebeians are number, strength, impatience and sedition. But a danger threatens the state: enemies are pressing hard upon Rome, private animosity is sunk, a dictator is appointed, the energy of an individual saves the republic; but the peril past, the magistrates resume their ordinary functions, and rivalry and discontent return.

The civil law is written, and the Twelve Tables, exposed

¹ "Et ita eodem pene tempore tria hæc jura nata sunt; leges XII Tabularum; ex his fluere cepit jus civile (the interpretation); ex iisdem legis actiones composite sunt. Omnium tamen harum et interpretandi scientia, et

actiones, apud collegium pontificum erant: ex quibus constituebatur, quis quoquo anno præset privata. Et fere populus annis prope centum hac consuetudine usus est." Dig. 1, 2, *De orig. jur.*, 2, § 6, f. Pompon.

to public view, have taught each citizen his rights and his duties. The *legis actiones* indicate the course that must be pursued in order to secure redress. Acquaintance with these proceedings, equally as necessary as knowledge of the laws, is a secret. The greater part of the patricians in the college of the pontiffs are the sole possessors of these legal mysteries, and the plebeian is constrained to have recourse to his patron, to the pontiffs, or to a patrician.

This is the point at which we have now arrived in the history of Rome, and the course we have traced is that which we may always trace in the history of a rising commonwealth: class distinctions become less easily maintained, the spirit of emulation has its sway, complex political interests arise, the civil law is stereotyped, and legal procedure reduced to regular forms.

II. FROM THE TIME OF THE TWELVE TABLES TO THE SUBMISSION OF ALL ITALY.

148. In the struggle between the patricians and the plebeians victory now began to lean towards the latter, and their progress henceforth is more easily marked. Every advantage gained by a party increases its strength and contributes to its future success.

In the period we are about to consider, we shall see that the patricians, who, in the first instance, retained all the powers in the state, are about to cede some of them, and that they will be obliged shortly to admit the plebeians to share in all. We find the glories of the nobility day by day decay, till patrician supremacy gradually dies out.

The Valerian Horatian law, *De plebiscitis*, the *plebiscitum Canuleium*, *De connubio patrum et plebis*, the creation of the military tribunes, as well as that of the censors, are changes directly due to the perpetual dissensions between the two orders.

SECTION XXIX.

LEX VALERIA HORATIA, DE PLEBISCITIS.

149. B.C. 449. This law, passed in the centuries under the consuls Valerius and Horatius immediately after the expulsion of the decemvirs, recognized the general authority, up to that time disputed, of the assemblies by tribes, and declared *plebiscita* decreed in these assemblies obligatory upon all citizens: "*Ut, quod tributum plebes jussisset, populum teneret.*"¹

The contents of this law are not very clearly known; either its provisions were far less complicated than this formula seems to indicate, or more remained to be done, or renewed dissensions caused this grave change in the constitution again to be seriously questioned, for we see at different intervals two similar laws re-enacted at different times and subsequent periods and in almost identical terms. It would be interesting to study the letter of these laws.

SECTION XXX.

THE CANULEIAN LAW (*De connubio patrum et plebis*).

150. B.C. 445. This *plebiscitum*, proposed by the tribune Canuleius, abrogated the provision of the Twelve Tables which prohibited marriage between the patricians and the plebeians. It was very quickly acted upon, and to the introduction of the plebeian families into the families of the patricians may be ascribed one of the most powerful causes which led to the annihilation of the distinctions between the two castes.²

¹ Livy, lib. iii. § 55: "Omnia primum, quum veluti in controverso jure esset, tenerentur patres plebiscitis, legem centuriatis comitiis tulere, 'Ut, quod tributum plebes jussisset, populum teneret.'"

² Florus, lib. i. § 25, seems to connect with the *plebiscitum* the third sedition of the plebeians and their retreat to the Janiculum. After speaking of the first on Mons Sacer, and the second on Mons Aventinum, he adds, "Tertiam seditionem excitavit matrimoniorum

dignitas, ut plebes cum patriciis jungerentur: qui tumultus in Monte Janiculo, duce Canuleio tribuno plebis, exarsit." Although the prohibition against the marriages between patricians and plebeians may have been the cause of these troubles and dissensions, yet we must not attribute the retirement of the plebeians to this cause. The authors who mention the Canuleian law, as for instance Cicero, *De republ.*, lib. ii. § 17, do not allude to these circumstances, and Pliny, *Nat. Hist.*, lib. xvi.

SECTION XXXI.

MILITARY TRIBUNES (*Tribuni Militum*).

151. The plebeians still lacked one of the most important public rights, the privilege of aspiring to the high dignities of the republic. They demanded admission to the consulate. It was not without a struggle that they attained it; but already they and their tribunes had become formidable: seditions were feared, and their demand was conceded. We may notice in reference to this an instance of political dexterity on the part of the senators. Inasmuch as it had become necessary to divide their consular power with their rivals, they resolved, if possible, to weaken it. Instead of two magistrates they desired that three should be chosen, and instead of giving them the name of consuls they were termed military tribunes. It thus looked as if the consulate had not departed from the patriciate; for rather than abandon it, they had extinguished the office, or it would perhaps be more correct to say that they had thus temporarily put it in abeyance, waiting an opportunity for its re-institution. At first the advantage about to be obtained by the plebeians was nothing more than one of right. They became admissible to the military tribunate, but were not, in fact, admitted, nor need we be astonished at this. Indeed, we might rather have been surprised had the contrary been the case. The elections belonged to the *comitia* by centuries, and we already know how it was composed; nor was it till about forty years after the creation of these tribunes, and when their number had been increased to six, that we begin to find plebeians among them. The power of the first military tribunes was of short duration: it existed a few months, and gave place to the government by consuls, who some years after, in their turn, were replaced by tribunes, and these alternate changes continued to take place from time to time. It is a curious fact, that for more than forty years, as the power of the contending parties oscillated, the consuls and the military tribunes successively

§ 10, represents the sedition as taking place long after, in 289 B. C. "Q. Hortensius dictator, cum plebs secessisset

in Janiculum legem in Eeculeto tulit, ut quod ea jussisset, omnes Quirites teneret."

appear and disappear; and sometimes in place of either, and superior to both, we find the dictator created.

Rome's success, however, increased day by day: it enlarged its inroads into Latium and advanced towards the conquest of Italy. Indeed, so long as the republican spirit existed amongst the citizens, devotion to country was but a natural instinct; the soldiers thought of nothing but Rome and its triumphs; and an enemy who dared to march against the city at once caused the suspension of all internal division, and found himself opposed by the strength of the whole Roman people.



SECTION XXXII.

THE CENSORS (*Censores*).

152. B.C. 443. The consuls had presided every fifth year at the numbering of the citizens. They had constructed the tables of the census, had assigned to each citizen his class in his tribe and in his *curia*, and had inscribed whom they thought fit in the ranks of knights and of senators. In this way they had at their will opened or closed the entrance to the order of knight-hood and to the dignities of the senate. We must inquire whether this power was conceded to the military tribunes, or, in other words, to those who might perchance be plebeians, to see whether such concession was made or whether the policy we have already noticed was still observed; whether, in fact, they did not consider it better to detach these peculiar functions from the office to which they had hitherto belonged in order to reserve them to themselves. This was unquestionably the idea which originated the new office, the censor.

153. The censors were two in number; they could only be selected from the members of the senate; they were elected by the *comitia* of centuries. The same senator could not occupy the post twice, and the term of office was five years, that is, from census to census. At a later period the term was reduced to one year and a half, there being in the interval no censor at all.

154. It is not difficult to understand the extent of the influence possessed by those who had the power of determining the class to which a citizen should belong;¹ and the exercise of this power, in the composition of the different tribes, was not without its use. There were not at any time more than four urban tribes, whereas the number of rural tribes ultimately reached thirty-one.²

In the former the censors inscribed all those who, not possessing any rural property, were included in the city: the enfranchised, the artisans, the *proletarii*. As to the proprietors, they were classified by the censors, with the agricultural lists, in the rural tribes where they had their estates. It was in this way that the votes of the more turbulent, and, at the same time, more dangerous, class were reduced, even in the plebeian assembly, to four out of thirty-five. This class frequently made the attempt to get itself divided amongst the rural tribes, an attempt which always excited the strongest opposition.

155. But the most extraordinary attribute of the censors is not that to which we have already referred. The entire moral influence that can exist in a state was lodged in their hands. As guardians of public and private morals they could blast the reputation of a plebeian, a senator, a consul, and even of the people. Thus they restrained the luxury of the rich; the licence of the libertine; the ill-faith of the truthless; the indolence of the knight, of the soldier, of the cultivator;³ and the weakness of the magistrate who, in danger, despaired of the republic. We have had instances of censors noting entire tribes. Such was the power which owed its great influence to public opinion and to the patriotism of every Roman!

¹ Varro, *De lingua latina*, lib. v. § 81: "Censor ad quojus censionem, id est arbitrium, censeretur populus."

² Nevertheless, at the date at which we have arrived, A.U.C. 311, B.C. 443, the number of tribes had not been increased beyond thirty-five, according to Livy. Vide supra, par. 73, and note.

³ Aul. Gell. lib. iv. § 12: "Si quis agrum suum passus fuerat sordescere,

eumque indiligenter curabat, ac neque araverat, neque purgaverat; sive quis arborem suam vineamque habuerat derelictui: non id sine pœna fuit; sed erat opus censorium; censoresque *ararium* faciebant. Item si quis eques Romanus equum habere gracilentum aut parum nitidum visus erat, *impolitiae* notabatur. Id verbum significat, quasi si tu dicas *incuriae*."

156. The notes of the censor were not without their effect. Thus, independently of the senators whom they could remove from the senate, of the knights whom they could deprive of their horses, even in the case of the simple citizen, they could effect his exclusion from any class whatever, and, in that manner, deprive him of the suffrage. A citizen thus excluded was not inscribed in the census, but his name was written in tables known as the tables of the *Cerites* (*Ceritum tabulæ* or *tabulæ Cerites*), in allusion to the municipality of Cæres, the inhabitants of which enjoyed all the rights of Roman citizenship except that of the suffrage. For the same reason they no longer appeared in the census for taxation in proportion to their wealth, but became *ærarîi*, subjected in this capacity to an arbitrary capitation as their modicum of taxation.¹

The arbitrary power of the censor was however modified by the influence of his colleague, who could at any time intervene either to stop or to annul the effect of his acts, but when both were in accord, their decision was final, and determined the status of each citizen for the ensuing five years.

157. During these political changes, the Roman armies were not inactive, as we see by the fate of the Equi and the Volsci, who were vanquished in many combats. Fidenæ was delivered to the flames, Falerii subjugated, and Veii captured after a siege of ten years. The soldiers had sworn never to re-enter Rome till they had captured this town, and they observed their oath. It was during these wars that, for the first time, the senate voluntarily, and without any demand either upon the part of the plebeians or of the tribunes, decreed that a bounty (*stipendium*) should be paid from the public treasury to the soldiers, whereas up to this time each soldier had been compelled to defray the expenses of his service from his own private

¹ Asconius, *Divinatio in Cecilium*, ch. 3: "Hi prorsus cives sic notabant, ut qui senator esset, ejiceretur senatu; qui equus Romanus, equum publicum perderet; qui plebeius, in tabulas *Ceritum* referretur et *ærarius* fieret, ac per hoc non in albo esset centuriæ suæ, sed ad hoc esset civis tantum, ut pro capite

suo tributî nomine sera penderet." Aul. Gell. lib. xvi. § 13: "Primos autem municipes sine suffragiî jure Cerites esse factos accepimus. . . . Hinc *tabulæ Cerites* appellatæ, versa vice, in quas censores referri jubebant quos notæ causa suffragiis privabant."

means; a share in the booty pillaged from the captured towns, and plots of land granted to the soldier from the territory of the conquered enemy, being the sole reward for military services. As soon as the news of this decision became known, the plebeians flocked in crowds to the door of the senate-house, and, taking the senators as they came out by the hands, they called them their true fathers. Rome in this way emerged from the condition of a collection of petty states, constantly carrying on hostilities with each other, to that of a great power bearing arms into distant countries and waging war upon remote enemies. And thus the citizen soldier became transformed into the stipendiary.¹

158. B.C. 390. But these triumphs were shortly to be succeeded by terrible reverses. Barbarians of a gigantic stature, and said to have been laden with ponderous arms, came from the other side of the Alps and made a descent upon Italy. These invaders were the Senonian Gauls. The Roman army was vanquished, Rome itself pillaged, sages and senators were massacred in their curule chairs, and public buildings razed to the ground. The city, in fact, was reduced to a heap of ruins and ashes. But Rome did not consist in mere walls and houses. It was in the Capitol and in the Romans themselves. And the Gauls, hurled by Manlius from the rocky heights, and torn in pieces by Camillus, cruelly expiated their momentary triumph. Rome rose from its ashes and soon recovered its ascendancy throughout Latium.

159. About twenty-one years after this, B.C. 367, the plebeian order achieved what it had previously been contending for, and secured the privilege of admission to the consulate; and from that moment the military tribunate disappeared for ever. Two sisters had married; the one a patrician, the other a plebeian. The latter heard one day in her sister's house the ringing of the

¹ Livy, lib. iv. § 60: "Additum deinde omnium maxime tempestivo principum in multitudinem munere, ut ante mentionem ullam plebis tribuno-

rumve decerneret senatus, ut stipendium miles de publico acciperet, quam ante id tempus de suo quisque functus eo munere esset."

fasces—a sound that she had never heard in her own. She was terrified, and the raillery to which she was subjected by the wife of the patrician touched her pride. Her husband sympathized in her humiliation; he attained to the tribunate, and avenged himself by opening to the plebeians the door to these magistracies. In this way, according to legendary lore, was a change accomplished whose effects were wholly disproportionate to the trivial incident out of which it arose.¹

The same policy which upon the establishment of the military tribunes had induced the senate to create censors now led it, upon the admission of the plebeians to the consulate, to detach from the consular office two magisterial functions. To this we must ascribe the origin of the prætors and the curule ædiles.²

SECTION XXXIII.

PRÆTOR (*Prætor*).

160. B.C. 367. The word *prætor* is derived from *præ ire*, and was in use in Latium to designate the first or chief magistrate of the city, and appears to have been sometimes employed in early periods by the Romans as an honorary appellation of the consuls. It is thus that we meet with it in the historians who refer to the time of the Twelve Tables and to the judicial functions of the consulate.³ But at the period with which we are now engaged this word became the exclusive title of a special magistrate. The senate detached from the functions of the consul all that related to his judicial office, together with the powers consequent upon it, and conferred them upon a special patrician magistrate, under the title, from that time peculiar to him, of prætor, which was qualified by the term “urbanus,” on account of his functions being limited to the city of Rome: “*Qui urbanus appellatus est*,” said Pomponius, “*quod in urbe jus redderet*.”

¹ Florus, lib. i. § 26.

² Livy, lib. vi. § 42: “Quum tamen per dictatorem conditionibus sedatas discordiæ sunt, concessumque a nobilitate plebi de consule plebeio; a plebe

nobilitati de prætore uno, qui jus in urbe diceret, ex Patribus creando.”

³ Vide supra, Table III. f. 5, and note; and Table XII. f. 3.

At first there was only one prætor, who was nominated by the centuries and selected from the patrician order. This official became the second dignitary in the republic. He was preceded by lictors, and considered the colleague of the consuls; and by some writers this title is given to him in this sense, that during the absence of the consuls, and while they were employed on military service, the prætor took their place in Rome. It was he who convoked the senate and who presided over it, who assembled the *comitia* and presented to them any suggestions as to new laws. We shall notice the gradual growth of the prætorian functions and trace the process by which a species of legislative power became attached to this office.¹



SECTION XXXIV.

CURULE ÆDILES (*Ædiles Curules*).

161. There already existed two plebeian magistrates called *ædiles*, charged under the supervision of the tribunes with the details of police. At this period two patrician magistrates were created bearing the same name and having analogous though superior functions. They were called *ædiles majores*, *ædiles curules*, while the others took the name of *plebeii ædiles*.² The latter thus found themselves limited to the exercise of inferior functions, and charged with the surveillance of the market, the price and quality of the commodities, the accuracy of the weights and scales, and the security and good order of the public streets; but all the higher offices of police were confined to the *curule ædiles*. To them belonged the maintenance and improvement of roads and bridges, the preservation of temples and amphitheatres, and the improvements in the city, together with the security of the public thoroughfares. They had a jurisdiction of their own, and a tribune for the administration of matters peculiar to their office. But the privilege which conferred the greatest distinction upon the office, and which came to be an essential part of it, was the direction of the public games.

¹ Dig. 1, 2, *De orig.*, 8, § 27, f. Pomp.

² Ibid. § 25, f. Pomp.

Rome already possessed its circus, where pugilistic encounters, combats, horse and chariot races, borrowed from the Olympic games of Greece, were celebrated. In their amphitheatres were to be seen the contest of gladiators and wild beasts, a bloody spectacle, but popular and suited to the national taste. Theatres for dramatic representations were erected at a later period. These games served as the means of celebrating public and private fêtes, especially the funerals of the great. Each citizen was at liberty to offer a spectacle to the people, but in every case it must be under the supervision of the ædiles, who themselves were compelled, at least once during the year, to present, at their own private expense, a public exhibition, and they took good care never to fail in this, for nothing was lost by it; the presentation of an acceptable spectacle to the crowd being at all times a sure means of securing its suffrage.

Next to the creation of the office of prætor, or, more properly speaking, the separation of its functions from those of the consulate, our attention is called to certain institutions whose origin is obscure and cannot therefore be assigned with accuracy to any particular date, but of which it is necessary to form a correct idea in order to complete our outline of the judicial system of the Romans.



SECTION XXXV.

JUDGE (*Judex*), ARBITRATOR (*Arbiter*), RECUPERATORS (*Recuperatores*).

162. From the earliest period of Roman history, under the kings, under the consuls, and after the creation of prætors, there existed a characteristic distinction, to which we have alluded already in treating of the text of the Twelve Tables, between the office of the magistrate and the functions of the judge, attached to the special commission given to him in each case to hear and determine a suit. This jurisdiction was vested at first in the kings, afterwards in the consuls, and finally in the prætors. It was before them that the *vocatio in jus* had to take place; it was before them that the solemn ceremonies peculiar to

the *legis actiones* had to be performed: upon them rested, at least during their term of office, the duty of declaring the law (*jus dicere*), of arranging the suit, and, in every case which they did not themselves determine, it was they who appointed the judge charged with the duty of hearing the suit and pronouncing judgment.

163. The judge, it must be remembered, was not a magistrate; he was a simple citizen, converted by the magistrate into a judicial officer in the individual case, at the conclusion of which his judicial functions ceased. It was a principle of Roman law that, whereas the magistrate had to be selected and created by the state, the judge, in each case, was to be nominated, or at least accepted, by the litigants, unless they were unable to agree, in which case he was selected by lot; but, although this was the case, all citizens were not eligible to be selected. From the earliest period, and at the time now under notice, this privilege was monopolized by the patrician caste. Senators alone could be judges. It was from the list of the three hundred senators (*ordo senatorius*) that the judge on each occasion had to be selected. The magistrate invested him with his powers, and he took the oath; *judices jurati* as Cicero says.¹

Such was the ingenious separation of the juridical from the judicial functions by which the Romans were enabled, with comparatively few magistrates, to provide for the wants of the administration of the law, appointing a judge for each case as it arose.

The generic name given to the citizen thus invested with judicial functions was *judex*, sometimes also *arbiter*, which appears to have been nothing but a modification of the former title, indicating that the magistrate, in consideration of the peculiar nature of the case, had given to him greater latitude. From the earliest times we find mention made both of *judex* and *arbiter*, and it is certain that but one judge, *unicus judex*,

¹ This institution is in fact "the jury," only that when contrasted with our modern system of trial by jury,

which is German and not Roman in its origin, we find several radical differences.

was appointed to each suit. It was usually the same with the arbitrators, although we see from the Twelve Tables¹ that their number might extend to three.

164. At a subsequent date, which, however, cannot be precisely determined, we find another kind of judge, called "recuperators" (*recuperatores*). This institution did not supersede that of judge or arbitrator, but existed side by side with it, so that the prætor in organizing the suit gave to the litigants, according to the circumstances, either a judge, an arbitrator, or recuperators.

But, notwithstanding the obscurity in which the origin and nature of the institution is involved, there are certain salient points by which the recuperator may be readily distinguished from the *judex* or *arbiter*. Thus, while there never was more than one *judex*, and usually only one *arbiter* for each case, the *recuperatores* were several, three or even five.²

Again, whereas the judge or arbitrator must of necessity be chosen from the order of senators, and at a later period from the annual list of citizens who were liable for judicial duty, the recuperators could be taken indiscriminately from all citizens at random, or from amongst those who happened at the moment to be before the magistrate, and who were at once appointed, "*Quasi repente apprehensi*."³ And, finally, questions were decided by them more speedily. "*Recuperatores dare ut quamprimum res judicaretur*," says Cicero. "*Recuperatoribus suppositis, ut qui non steterit, protinus a recuperatoribus . . . condemnentur*."⁴

In effect, by the employment of *recuperatores* business was despatched more speedily; the monopoly of the judicial functions by the senatorial order was broken through, and the plebeians made good their first step in advance towards the judicial office.

¹ Table VII. f. 5, and XII. f. 3.

² Livy, lib. xxvi. § 48; lib. lxiii. § 2. Cicero, *In Verr.*, 3, §§ 13 and 60. Gai., *Instit.*, 4, §§ 46, 105 and 109.

³ "Nam ut in recuperatoriis judiciis,

sic nos in his comitiis, quasi repente apprehensi sincere judices fuimus."

Plin., *Epist.*, 3, 20.

⁴ Cicero, *Pro Tullio*, 2; *De divin.*, 17. Gai., *Instit.*, 4, § 185.

165. The fact that the Romans in earlier times gave the name of *recipatores* or *recuperatores* to officials appointed by virtue of international treaties to settle differences either between Rome itself and foreign cities or nations, or between Roman citizens and foreigners, affords general ground for the belief that the *recuperatores* were employed originally solely for the purpose of determining disputes between Roman and foreigner.¹ This conjecture is corroborated by another circumstance, that at a later period the judges in the provinces never had any other title than that of *recuperatores*, so that the *judex* existed only in Rome, whereas the title of *recuperator* is found in connection with the provinces. As to the period immediately under our notice, that is to say, the commencement of the fifth century, a hundred years before the creation of the *prætor peregrinus*, we are of opinion that the employment of *recuperatores* was of rare occurrence, and resorted to only in cases where Roman law could not be applied; in other words, in suits in which *peregrini* were litigants. It is natural that at a later period this custom should have developed into a regular system of procedure, and we shall see that it ultimately extended to the citizens themselves, and that the determination of cases, generally of an urgent character, devolved upon these *recuperatores*.² But we must be careful not to confound with the procedure of the *legis actiones* now before us, details which belong to a much later régime. The employment of *recuperatores* commenced during the period of the *legis actiones*, but was independent of and never had any connection with them.

SECTION XXXVI.

CENTUMVIRS (*Centumviri*).

166. To the judges, arbitrators, and the recuperators, who derived their official powers from the magistrate, must be added

¹ "*Reciperatio* est, ut ait Gallus Ælius, cum inter populum et reges nationesque et civitates peregrinas lex convenit quomodo per recipatores red-dantur res, recipenturque, resque pri-vatas inter se persequantur." Festus,

on the word *Reciperatio*. We see an instance of a similar provision in the *plebiscite, De Thermensibus*.

² See especially Gai., *Instit.*, 4, §§ 46, 141, 183, 185, 187.

the *centumvirs*, an institution whose origin, organization and jurisdiction are involved even in greater obscurity than those of the three former functionaries.

The characteristic differences between the *centumvirs* and these three functionaries—a difference so well established as to be beyond dispute—was, that instead of being nominated for an individual case, the *centumvirs* constituted a permanent tribunal, whose members were elected in equal number from each tribe, whether, as we think, from among all the citizens of the tribes indifferently, or whether they were confined to the senators. There is little doubt that this institution was another instance of plebeian triumph, and an invasion on the monopoly of the patricians. The existence of the plebeian tribes, the tribunes being nominated by them, and the fact of the *centumvirs* also coming from their ranks, all indicate the political progress accomplished by this class, and show that they had made their way into the domains of the magisterial, the legislative and the judicial functions of the state.

167. The rule limiting the tenure of office of magistrates and other public functionaries to one year may be taken as a sufficient reason for assuming that the citizens composing the tribunal of *centumvirs* were also elected for one year; and that although the tribunal itself was permanent, the individuals constituting it were elected annually. It is a disputed point whether the election was made by the *prætor* alone or separately by each tribe, or by all the tribes united together in *comitia*. In the absence of precise information, the public character of this tribunal, and the political nature of its origin, authorize us in adopting the latter opinion. As to the number of members elected in each tribe, we find at a subsequent period, and when the tribes were in all thirty-five (B.C. 242), that each furnished three members to the *centumviral* tribunal, making a total of 105 *centumvirs*;¹ and at a still later period Pliny speaks

¹ “*Centumviralia judicia a centumviris sunt dicta. Nam, cum essent Romæ triginta et quinque tribus, terni ex singulis tribubus sunt electi ad judi-*

candum, qui centumviri appellati sunt; et licet quinque amplius quam centum fuerint, tamen quo facilius nominarentur, centumviri sunt dicti. Centumvi-

of 180 as sitting in a single cause.¹ Varro also intimates that the number of centumvirs must only be taken approximately and not literally.²

168. The centumviral tribunal was divided into four chambers or councils (*consilia, tribunalia*), and we find in contemporary writers certain positive indications of the fact that cases were sometimes tried before two chambers (*duplicia judicia, duæ hastæ*³), sometimes before the four sitting together but each voting separately (*quadruplex judicium*⁴), though it is impossible for us to determine what the object was of this division into chambers, or of judgment being delivered by the four chambers sitting together. Certain fragments of the Digest appear to indicate traces of the existence of this division.⁵

169. The centumviral tribunal thus constituted was a tribunal essentially Quiritarian. The Quiritarian symbol of Roman property, the lance (*hasta*), was erected before it as an indication of its actual power, and, perhaps, of its attributes.⁶ It assembled in the Forum; at a later period the Julian basilica was appropriated to it. The quæstors upon going out of office were empowered to convoke it (*hastam cogere*), and to preside over it (*hastæ præesse*). It is, however, under the presidency of the prætor that contemporaneous writers represent the four sections as united.⁷ Under Octavius it was presided over by

ralia judicia, quæ centumviri judicabant." Festus, on the word *Centumviralia*.

¹ Plin., *Epist.*, 6, 33.

² "Si, inquam, numerus non est ad amussim, ut cum dicimus mille naves ad Trojam isse, centumvirale judicium Romæ." Varro, *De re rustic.*, 2, 1.

³ "Aut quum de eadem causa pronunciatum est, ut in reis deportatis, et assertionem secunda, et partibus centumviralium, quæ in duas hastas divisæ sunt." Quintil., *Instit. orat.*, 5, 2, § 1. "Etiam si apud alios iudices agatur, ut in secunda assertionem, aut in centumviralibus judiciis duplicibus." Quintil., *Instit. orat.*, 11, 1, § 78.

⁴ "Proxime quum apud centumviros in quadruplici judicio dixissem, subiit

recordatio egisse me juvenem æque in quadruplici." Plin., *Epist.*, 4, § 24.

"Femina . . . quadruplici judicio bona paterna repetebat. Sedebant iudices centum et octoginta: tot enim quatuor consiliis conscribuntur . . . sequutus est varius eventus: nam duobus consiliis vicimus, totidem victi sumus." Plin., *Epist.*, 6, 33. See also *Epist.*, 1, 18; and Quintil., *Instit. orat.*, 12, 5, § 6.

⁵ Dig. 5, 2, *De inoffic. test.*, 10, pr. l. Marcell.; 31, *De legat.*, 2, 76, pr. l. Pomp.

⁶ "Unde in centumviralibus judiciis hasta præponitur." Gai., *Instit.*, 4, § 16.

⁷ Plin., *Epist.*, 5, 21: "Descenderam in basilicam Juliam . . . Sedebant

special magistrates, called judiciary decemvirs (*decemviri in litibus judicandis*), whose creation was of earlier date, but whose complete functions are unknown to us.¹

170. Notwithstanding the fact that the centumviral tribunal was a permanent institution, the centumvirs themselves were but simple citizens, annually elected to their post. This tribunal had not what the Romans called *jurisdictio*. The appearance *in jure* had, in all cases, to take place before the magistrate. Before him the religious ceremonial of the *legis actiones* had to be performed, and the litigants were by him sent for trial before the *centumviri* if it was a case within their proper cognizance. The only *legis actio* applicable to matters within the cognizance of the tribunal was the most ancient of all—the *sacramentum*.²

171. It would be worth while to inquire in what the functions of the centumviral tribunal consisted. Cicero in his treatise *De oratore* furnishes us with a long and minute enumeration of matters of which it took cognizance, all of which may be arranged under three distinct heads: State questions, Quiritarian property and testamentary or intestate succession³—that is to say, the whole fundamental basis of Quiritarian society, except possession and the rights thereunto attached,—and obligations.

judices, decemviri venerant, observantur advocati; silentium longum, tandem a prætore nuntius . . . (This messenger announces an adjournment of the sitting) prætor, qui *centumviralibus presidet*. . . inopinatum nobis otium dedit."

¹ "Auctor . . . fuit (*Octavius*) . . . ut centumviralem hastam, quam quæstura functi consueverant cogere, decemviri cogere." (Sueton., *Octav.*, c. 36.) Dig. 1, 2, *De orig. jur.*, 2, § 29, f. Pompon.: "Deinde cum esset necessarius magistratus qui hastæ præesset, decemviri in litibus judicandis sunt constituti." Pomponius, however, when speaking of the decemvirs never mentions the centumvirs, probably because, as he was treating of magistrates, he did not consider them as such.

² "Cum ad centumviros itur, ante

lege agitur sacramento apud prætorem urbanum vel peregrinum." Gai., *Instit.*, 4, § 31.

³ "Nam volitare in foro, hæerere in jure ac prætorum tribunalibus, judicia privata magnarum rerum obire, in quibus sæpe non de facto, sed de æquitate ac jure certatur, jactare se in causis centumviralibus, in quibus usucapionum, tutelarum, gentilitatum, agnationum, alluvionum, circumluvionum, nexorum, mancipiorum, parietum, luminum, stillicidiorum, testamentorum ruptorum et ratorum, cæterarumque rerum innumerabilium jura versentur, cum omnino quid suum, quid alienum, quare denique civis an peregrinus, servus an liber quisquam sit, ignoret, insignis est impudentiæ." Cicero, *De orator.*, 1, 38. See also *Pro Milon.*, 27; *Epist. ad fam.*, 7, 32.

The fact of their taking cognizance of questions of succession is noticed in the Digest and in Justinian's Code,¹ which also bear testimony to the importance and authority of this tribunal. "*Magnitudo etenim et auctoritas centumviralis iudicii non patiebatur per alios tramites viam hæreditatis petitionis infringi.*"² We may also gather from certain passages that the litigants themselves had a limited power to elect by consent whether their suit should be heard by the centumviral tribunal or by any other,³ also that the court had in addition to its civil a criminal jurisdiction.⁴

172. The date of the origin of this institution is uncertain, unless we adopt Niebuhr's opinion, that Servius Tullius introduced a complete system of balance of power when he created the thirty plebeian tribes as a counterpoise to the thirty patrician curies. In that case the centumviral tribunal would date from that period, and being especially empowered with the right of determining questions affecting Quiritarian property, it would attach itself to the institution of the census, organized by the same king.

On the other hand, if we adopt the view which Livy appears to indicate of the successive creation of the tribes,—for it was not till B.C. 242, or A.U.C. 512, that the number of the tribes reached thirty-five, which would give one hundred and five centumvirs at the rate of three for each tribe,—we must ascribe the institution of the centumvirs to that period.⁵

This, however, appears to us untenable, for even assuming the accuracy of Livy's statements as to the gradual growth of the tribes, there is nothing to warrant the assumption that originally three centumvirs only were selected from each tribe,

¹ Dig. 5, 2, *De inoffic. test.*, 13, f. Scævola, et 17, pr. f. Paul. Cod. 3, 31, *De pet. hæred.*, 12, pr. *Const. Just.*

² Cod. *ibid.*

³ "Post hoc, ille cum cæteris subscripsit centumvirale iudicium, mecum non subscripsit." Plin., *Epist.*, 5, 1. Gai., *Inst.*, 4, § 31.

⁴ Quintil., *Inst. orat.*, 4, 1, § 57; 7, 4, § 20. Senec., *Controv.*, 3, 15. Ovid., *Trist.*, 2, 91 et seq. Phædr., *Fabul.*, 3,

10, 34.

⁵ According to this writer there were—

25 tribes	..	..	B.C. 387
27 "	..	..	" 359
29 "	..	..	" 333
31 "	..	..	" 319
33 "	..	..	" 300
35 "	..	..	" 243

See Livy, 6, § 5; 7, § 15; 8, § 17; 4, § 20; 10, § 19. Livy, *Epist.*, 19.

for we have seen that this number existed when the tribes were thirty-five. And the fact of the centumvirs being increased in the time of Pliny to a hundred and eighty, shows that this number was at no period irrevocably fixed, and it is quite possible that the number representing each tribe was greater when the tribes themselves were few. This view is confirmed by the fact that at the period when, according to Livy, there were twenty-five tribes, the centumviral tribunal was composed of four citizens from each tribe, thus consisting originally of exactly one hundred.

So that we should fix the date of the creation of this institution somewhere between the years B.C. 387 and B.C. 359; that is to say, the period marked by the increasing power of the plebeians, their admission to the consulate, and the creation of the prætorship.

It appears to us, that to ascribe the origin of the centumvirs to the year B.C. 242, the time when the *legis actiones* were suppressed, is to deprive that institution in a great measure of its principal characteristic, its antiquity.

Dating from the suppression of the *legis actiones*, it entered upon a gradual decline, though the progress of this decline was slow, and continued even to the time of the Lower Empire, carrying with it down to that period vestiges of the ancient *sacramentum*. We might conjecture from the title of one of the works of Paul, *De septemviralibus judiciis* (D. 5, 2, *De inoff. test.*), that is to say, if it is not an error on the part of the copyist, that in the time of this jurist the number of judges at least for each chamber was reduced to seven.

173. In conclusion, assuming the date to which we have ascribed the origin of this institution to be correct, we may define the jurisdiction of the different judges as follows: the centumvirs took cognizance of questions of state, Quiritarian ownership, and succession; the judge, or one or more arbitrators, took cognizance of *obligationes* and *possessiones*; and, finally, the recuperators of those matters in which the interests of the *peregrini* were involved, which were necessarily beyond the pale of Quiritarian law and the *legis actiones*.

174. B.C. 338. At this epoch the Gauls had been driven beyond the Po, all Latium was subject to the Roman yoke, and the conquest of the rest of Italy had been commenced. The plebeians were already admitted to the consulate, and had made good their footing in the censorship. These two offices opened the road to the senate, and shortly after to the prætoriate; their next step was the law *Petillia Papiria, De nexis*, and the publication of the *dies Fasti* by Flavius.



SECTION XXXVII.

THE LEX PETILLIA PAPIRIA (*De nexis*).

175. B.C. 326. This law, which Livy calls the commencement of a new era of liberty for the plebeian, owes its origin to the reaction caused by the excesses of a creditor, L. Papirius. The cruel fate which awaited the debtor, and the severity with which he was liable to be treated, was the instrument which the tribunes used in exciting the animosity of the plebeians against the patricians. "Do they wish," said Sextius and Licinius, on one occasion, "that the houses of the nobles should be full of captives, and that every patrician residence should be a private prison" (*et ubicunque patricius habitat, ibi carcerem privatum esse?*)¹ The *lex Petillia Papiria* prohibited debtors from assigning themselves *per æs et libram* in slavery to their creditors as security for their debts, and in this way terminated the servitude of the *nexi*. But we must not interpret this expression as including the suppression of the captivity of the *addicti*, that is to say, the execution issued against the person of the debtor by means of the *legis actio, manus injectio*. It was the *nexum* alone that was modified by this law, and from this it became illegal to pledge the person, but not the goods, *per æs et libram* to the creditor.²

¹ Livy, lib. vi. § 36.

² "Eo anno (428) plebi Romanæ, velut aliud initium libertatis factum est, quod necti desiderant. Mutatum autem jus ob unius feneratoris simul libidi-

nem, simul crudelitatem insignem. . . Jussique consules ferre ad populum, ne quis, nisi qui noxam meruisset, donec poenam lueret, in compedibus aut in nervo teneretur: pecuniæ credita, bene

SECTION XXXVIII.

ON THE DISCLOSURE OF THE DIES FASTI AND THE ACTIONES LEGIS (*Jus Flavianum*.)

176. B.C. 304. Rome was indebted to the grandson of the enfranchised Cnæus Flavius for the promulgation of the *dies Fasti* and for the publication of a work setting out in detail the steps and the formulæ necessary for conducting the *legis actiones*.

This book was a species of practical manual upon the *actiones legis*, and acquired the name of *jus civile Flavianum*. It is worth while to inquire how this book came to be published—whether Flavius was the scribe or secretary of Appius Claudius Cæcus, and whether Pliny is right in saying that it was by the advice of this jurist that Flavius, aided by his own ingenuity and power of observation, took the step of bringing out the manual; or whether we may depend upon Pomponius, who says that the compiler plagiarised from a manuscript work upon the *actiones* composed by Appius Claudius. In either case the publication would seem to have been so acceptable to the people that they allowed the author to be successively raised to the dignity of tribune, of senator, and of curule ædile.¹ But was he already a curule ædile, and did he profit by the opportunities afforded him by his office to discover and popularise the *actiones legis* (*civile jus, repositum in penetralibus Pontificum, evulgaret*), and to publish in the forum, in the shape of an edict, a list of the *fasti* (*fastisque circa forum in albo proposuit*)? The last is the view adopted by Livy.² “He thus put out the crows’ eyes” (*qui cornicum oculos confixerit*), says Cicero, in derision, alluding to the pontiff and patricians, to whom it had previously been necessary to have recourse as to the Chaldeans in order to ascertain these days.³ Pomponius relates that Appius Claudius Cæcus had also, so tradition alleged, written at the same period a book then no longer extant, which commenced with a chapter upon the interruption of prescription (*De usurpationibus*).⁴

debitoris, non corpus obnoxium esset. Ita nexi soluti: cautumque in posterum, ne necerentur.” Livy, lib. viii. § 28.

¹ Pliny, *Hist. nat.*, 33, 6. Dig. 1, 2, *De orig. jur.*, 2, § 7, f. Pompon. See

also Macrobius, *Saturnalia*, 1, 15.

² Livy, 9, 46.

³ Cicero, *Pro Murena*, 11.

⁴ Dig., 1, 2, *De orig. jur.*, 2, § 86, f. Pompon.

177. Be this as it may, the progress thus made by the plebeians in the course of their advancement to political power was immense. The consulate, the prætorship, the censorship, the greater ædileship, and the senate, they already shared with the patricians; as recuperators and centumvirs they took a part in judicial proceedings, and the publication of the *dies fasti* and the *legis actiones* initiated them into the sacerdotal and patrician formulæ, which were indispensable for the right conduct of legal matters. The only office that remained beyond their reach was the sacerdotal, and three years afterwards, B.C. 301, they attained this also. The number of pontiffs was raised to eight, that of the augurs to nine, and four plebeians were admitted to the former and five to the latter.



SECTION XXXIX.

LEGES PUBLILÆ—LEX HORTENSIA (*De plebiscitis*).

178. B.C. 286. Two laws had already been passed concerning the authority of the *plebiscita*, the *lex Horatia* and the *lex Publilia* of the dictator Publius Philo, B.C. 339. Under the name of this dictator, with whom the office of dictator became popular, Livy¹ mentions three laws (*leges Publiliæ*) which were favourable to the plebeians and unfavourable to the nobility (*secundissimas plebei, adversas nobilitati*). By one of these it was ordained that one of the censors should be taken from the plebeians. Another related to the laws decreed by the centuries. Notwithstanding the fact that the convocation of these assemblies (as also that of the curies) and all projected laws were submitted to and required the previous consent of the senate, it was also necessary that, after the vote in their favour had been obtained, the senate should give its *auctoritas*. This double power is distinctly indicated by Livy, who ascribes its origin to the legendary period of Rome, and mentions it as being in force upon the nomination of the successor of Romulus.*

¹ Lib. viii. 12.

* Livy, 1, 17.

Livy adds that, in his time, and so far at any rate it must have been a fact, this practice prevailed both as regards the laws and the magistracies, only with this difference that prior to the vote the senate gave its *auctoritas* by anticipation.

Such was the provision of the *lex Publilia*. "*Ut legum quæ comitiis centuriatis ferrentur, ante initum suffragium, patres auctores fierent.*"¹

The third Publilian law to which we here especially direct attention related to the *plebiscita*.

We remark that Livy² alludes to it in terms almost identical with those of the *lex Valeria Horatia*, passed upon the same subject 110 years previously,³ "*Ut plebiscita omnes Quirites tenerent.*"

179. Again, fifty-three years after the publication of the *lex Publilia*, we have, thirdly, the *lex Hortensia*, *De plebiscitis* (B.C. 286), of which Pliny gives us the initiatory clause in the same terms which we find in Aulus Gellius.⁴

The passage quoted by us in the note from Pliny shows that the plebeians, for a third time, had retired from Rome and were encamped upon the Janiculum, when the dictator Hortensius caused the law which bears his name to be passed, which for the third time confirmed and extended the force of the *plebiscitum*.

These three identical laws, enacted upon the same subject at different intervals during a period of a century and a half, cannot fail to embarrass the critic. There was some cause for this reiteration, whether in the recurrence of circumstances or

¹ See above, § 69.

Livy, 1, 17: "Quirites, regem creant; ita Patribus visum est," behold the initiative of the senate. "Patres deinde, si dignum, qui secundus ab Romulo numeretur, creant, auctores fient," see the later law thus expressed by Livy: "Decreverunt enim, ut quum populus regem jussisset, id sic ratum esset si Patres auctores fierent;" then he adds: "Hodieque in legibus magistratibusque rogandis usurpatur idem jus, vi adempta. Priusquam populus suffragium ineat, in incertum comitiorum eventum Patres auctores fiunt."

² Livy, 8, 12.

³ See above, § 149.

⁴ Pliny, *Nat. hist.*, lib. xvi. § 15: "Q. Hortensius dictator, quum plebs accessisset in Janiculum, legem in Esculeto tulit, ut quod ea jussisset, omnes Quirites teneret." Aul. Gell. lib. xv. c. 27: "Plebiscita appellantur, quæ tribunis plebis ferentibus accepta sunt: quibus rogationibus ante patricii non tenebantur, donec Q. Hortensius dictator eam legem tulit, ut eo jure quod plebes statuisset, omnes Quirites tenerentur."

repetition in the text of the laws themselves, which is unknown to us. The following considerations may to some extent afford an explanation. The *comitia* by tribes gave the tribunes this advantage, that they had the initiation of laws without the prior consent of the senate; but, in order to become law, our knowledge of the constitution shows us that it was necessary that the decision of the tribes should be confirmed by a vote of the centuries, and afterwards by the *auctoritas* of the senate, which, as we have already seen, was necessary in connection even with the decisions of the centuries.¹ Among other suppositions, it has been suggested that the *lex Valeria Horatia* was only enacted in relation to certain questions already determined, and that the *lex Publilia* rendered the confirmation by the centuries unnecessary in all cases, though it did not interfere with the necessity of obtaining the *auctoritas* of the senate; and, finally, that the *lex Hortensia* completed the system by abrogating this *auctoritas* altogether. But, be this as it may, after the last of these enactments the validity of the *plebiscitum* was never disputed. We may therefore attribute the *plebiscita* to this period in the legal history of Rome, not merely as regards public but also in connection with private civil law. Indeed most of the enactments regulating private law originated with the plebeians.

Theophilus, in his paraphrase on the Institutes,² says that the *lex Hortensia*, while it secured the force of the *plebiscita*, also established that of the *senatus-consulta*; but this unsupported assertion, to which we shall subsequently refer, has met with little favour.

180. At this period the Roman arms had successively and rapidly overcome the different states of Italy. The Samnites, notwithstanding their victory of the Caudine Forks, had been destroyed: their overthrow was followed by that of the Etruscan nations, the Larentini, aided by Pyrrhus, the Picentini and the Salentini, and finally the Volsci. The diorama of military successes closes with a triumph over the soldiers of Macedonia

¹ See above, §§ 69 and 178.

² 1, 2, § 5.

and Thessaly, with the procession of golden statues and pictures the spoil of Tarentum, and the elephants of Pyrrhus, which those soldiers had been unable to defend.

B.C. 266. At the epoch at which we have now arrived Rome had been in existence but a few centuries; but what had become of the people who at the birth of Rome occupied the lands she now held? The Albans, the Sabines, the people of Veii have been incorporated in the new state; the Equi, the Volsci and the Samnites, who struggled against their fate, no longer exist; the Etruscans, the Campanians, the Tarentines have submitted to the yoke and been received as allies, and all Italy is subservient to Rome. Still its empire was destined to increase, and as we watch its progress we shall mark the gradual disappearance of the barbarism, the poverty and the vigour of the republican period, as the rude and primitive institutions of its early days yield to the progress and influence of civilization. Before we proceed, it will be as well to review the outline of those institutions whose origin and birth has been already traced.

REVISION OF THE PRECEDING PERIOD.

THE FOREIGN POLICY OF ROME.

181. To sow discord among different nations in order to array one against another,—to assist the vanquished in conquering their conqueror,—to husband its own resources, and under the pretext of defending its allies to exhaust them,—to invade the territories of its neighbours,—to interfere in the disputes of other states, so as to protect the weaker party and finally subjugate both,—to wage unceasing wars, and prove itself stronger in reverses than in success,—to evade oaths and treaties by subterfuge,—to practise every kind of injustice under the specious guise of equity—this was the policy that gave Rome the sceptre of all Italy, and which was destined to secure for it that of the entire known world.

182. But it is rather with its legal history in relation to other nations that we are now concerned.

The subject is obscure and complicated, for many reasons. First, because it contains a number of different elements which must be carefully distinguished; secondly, because there was no uniform policy applicable alike to all the cities and territories connected with the ruling state, but its relation with each depended on the terms and conditions of treaties; and, thirdly, because up to the period at which our history has arrived we have but few trustworthy records upon which we can rely for that accuracy which is necessary for the satisfactory pursuit of legal study.

183. We must consider this subject, first, in relation to the cities themselves; secondly, in relation to the soil or territory; thirdly, in connection with the persons or inhabitants.

1st. As to the cities: what was their organization, administration, and legislation? Were they independent, or were they dependencies of Rome? Had they a legislature of their own, or were they subject to Roman law, private or political, or to both united?

2nd. As to territory: was it the property of the state, or of Rome? In either case, by what system of legislation was it administered? Was it considered as foreign soil, to which neither Quiritarian ownership nor any other legal institution of Rome could be applied? Or was it assimilated to the *Ager Romanus*, and susceptible of Quiritarian ownership and amenable to the processes of the civil law?

3rd. As to the persons or inhabitants: were they admitted to the enjoyment of civil rights as Romans, either in part or in whole, in the character of private citizens only, or as regards political rights, or in both; or were they excluded from both and but in the position merely of foreigners?

These points, which it is necessary to examine in connection with this subject, may be all comprised in the answer to the question whether there was, as regards the city, the soil or the individual, any participation in the public or private privileges of Roman citizenship.

184. The subject is a complex one, because so much depends upon the nature of the conditions under which alliances were made, and the concessions granted by Rome to the states which it admitted into alliance, or which were in the position of conquered people, the nature of treaties, the character of the *plebiscitum*, and the law and procedure (*lex, formula*) which regulated the condition of each town, besides the innumerable details regarding local matters which the consideration of these questions involves.

185. In the first place, the Quiritarian law, which was confined to the Roman citizens (*jus Quiritium, jus civitatis, jus civile*), may be considered under two heads,—private law and political rights. The former comprised—First, the *connubium*, conferring upon those who enjoyed it the right of contracting between themselves, or with Roman citizens, the *justæ nuptiæ* or Roman marriage, whence sprang the *patria-potestas*, agnation, and all the effects of the civil law. Secondly, the *commercium*, which affected the individual and the soil: as to persons, conferring the right to make contracts with citizens and to acquire and alienate property under the operation of civil law; as to land, constituting it Quiritarian property, also under the operation of the civil law. And, thirdly, there was the *factio testamenti*, the capacity of receiving from citizens, or of making dispositions in their favour by will, under the provisions of Roman law. This privilege appears to follow, not indeed necessarily but generally, from the right of *commercium*, from the time that the testament or will was made with the fictitious ceremony of the *mancipatio*.

Under the second head of the *jus Quiritium* may be classed political rights, the *jus honorum*, or the capacity to hold office and magistracies in the state; and, secondly, the *jus suffragii*, or the right of voting in the *comitia*. These were the principal features of the *jus civitatis*, conferring rights and privileges which could be granted separately or collectively by the ruling power to cities, to territories, or to individuals, and which as a whole was called the *optimum jus*.

186. Taking these subjects in order, and confining ourselves to general remarks, we have in the first place to consider cities. Here we find—

(1.) Rome the dominant city, the sovereign power.

(2.) The Roman colonies (*coloniæ Romanæ, coloniæ togatæ*), which were offshoots from Rome, constituted on the Roman model, with their petty senate (*curia*), their two consuls (*duumviri*), their order of patricians and plebeians admitted, both as to the population of the colony and to the soil assigned to it, to a complete participation in the rights of private Roman citizenship (*connubium, commercium, factio testamenti, dominium ex jure Quiritium*); but deprived of those of public citizenship (*civitas absque suffragio*). This, at least, is our opinion, though the fact has been disputed. Daughters of Rome, they did not cease to observe its laws, to be dependent and under its government.¹ They served as a bulwark for its defence and a *point d'appui* for its attacks. As Rome's power increased these *coloniæ* multiplied, and when it came to embrace all Italy (which was the case at the period at which we have arrived) they were necessary as stepping-stones, or foundations laid at different points in its progress, upon which it could plant its foot. In those towns which had presented the firmest resistance to Roman arms a *senatus-consultum* decreed the establishment of a colony, and commissioners, called *triumviri* or *quinqueviri* according to their number, were appointed. These functionaries enrolled the enfranchised, the *proletarii*, who volunteered, conducted them to the spot, and distributed amongst them, in some cases, a portion of the territory of the conquered town; and sometimes, but more rarely, the whole of it, without leaving anything to the former inhabitants, and the colony was then founded upon the model of the mother city. Nothing less than a law or a *senatus-consultum* could authorize the establish-

¹ Aul. Gell., lib. xvi. § 18: "Coloni-
arum alia necessitudo est; non enim
veniunt extrinsecus in civitatem, nec
suis radicibus nituntur; sed ex civitate
quasi propagatæ sunt, et jura instituta-
que omnia populi Romani, non sui arbitrii
habent. Quæ tamen conditio, cum sit

magis obnoxia et minus libera, potius
tamen et præstabiliior existimatur, pro-
pter amplitudinem majestatemque populi
Romani, cujus istæ coloniæ quasi effigies
parvæ simulacraque esse quædam vi-
dentur."

ment of a colony in this way,—could regulate the grant of the lands, and bestow upon it the title and privileges of a Roman “colony.” At the period to which we now refer more than thirty of these colonies had been thus established.

187. (3.) The cities of Latium bore different titles, and were placed under various conditions, according to the treaty entered into with each; they were either free towns or allied towns (*civitates liberæ, civitates fœderatæ*). These were the nearest neighbours of Rome, the earliest subjected to its power or taken into its alliance. Occasionally they had thrown off the burden which the obligation of the observance of treaties laid upon them, but only to subject themselves at a later period to a more onerous yoke. But the defeat at the lake Regillus, B.C. 496, of which the Romans frequently reminded them, and later on the issue of the war, B.C. 338, in which the consul Decius Mus devoted himself for the Quirites and for the legions, bound them irrevocably to the fortunes of Rome. After the severe treatment to which they were subjected upon defeat, those cities which had escaped destruction in the war, or which had not been transformed into *coloniæ*, were allowed to remain in the enjoyment of independence under the conditions of the treaties admitting them to alliance, and concessions more or less liberal, in the shape of admission to the rights of Roman citizenship, were made to them. Thus we find that they had generally the *commercium*, and that their soil was susceptible of Quiritarian ownership. Having the *commercium*, their citizens consequently enjoyed the *factio testamenti*, possibly with certain restrictions.¹ They had not the *connubium*, but they

¹ The situation of the *Latini Juniani* at a later period is described by the Roman jurists in precise terms, which enable us to judge by comparison of the condition of the *Latini veteres*. The *Latini Juniani* could take part in a testamentary act made *per æs et libram* in the capacity of scale bearers, witnesses or purchasers of the patrimony, that is to say, they could be *heredes instituti*: “*Latinus Junianus et familiæ emptor et testis et libripens fieri potest, quoniam cum eo testamenti*

factio est.” (Ulp. tit. 20, § 8.) But they had not the right to receive, or, in the technical terms of the law, the right to take the inheritance which had been conferred upon them (*jus capiendi ex testamento*), unless at the death of the testator, or during the period allowed for the purpose, which was called *cretio*, he had become a Roman citizen. “*Si quidem mortis testatoris tempore vel intra diem cretionis civis Romanus sit, hæres esse potest; quod si Latinus manserit, lege Junia capere hereditatem*

could acquire in different ways, regulated by special enactments, the entire rights of Roman citizenship, and it is this which particularly distinguished them from others. There were cases in which the *connubium*, and a participation to a certain extent in political rights, were conceded to certain cities. These were cases in which the inhabitants had been long in alliance with Rome (*Latini veteres*), and had remained faithful to it in the insurrection of B.C. 338, or for some reasons of state policy had been treated with more than ordinary indulgence. In such cases the citizens of the favoured towns, who happened to be at Rome at the time of the sittings of the *comitia*, were at liberty to vote, and the tribe to which they should for the time attach themselves was determined by lot.

Such are the chief characteristics of the law which governed Latium (*jus Latii, jus Latinitatis*). We have not the information necessary to enable us to deal with this subject in the detail and with the accuracy which a study of this kind demands, and have therefore been compelled to depend upon traces, doubtless more or less defaced or obliterated, of a later *jus Latinitatis* which we meet with in Gaius and Ulpian, as the personal condition and status of a certain class of enfranchised.¹

The *jus Latinitatis* became in course of time extended to towns and countries beyond Latium, and still later to those beyond Italy; for example, to Spain and Gaul, to the inhabitants of which the *jus Latii*, and not the full rights of Roman citizenship, was accorded.

188. (4.) The Latin colonies (*Latinæ*, or *Latini nominis coloniæ*), were colonial communities, assimilated not to Rome,

prohibetur." (Ulp. tit. 22, § 3.) As to his taking part as testator in such a ceremony he could not, because he was expressly excluded from this right by the Junian law. "Latinus Junianus, item is qui deditiorum numero est, testamentum facere non potest: Latinus quidem quoniam nominatim lege Junia prohibitus est." (Ulp. tit. 20, § 14.) We are authorized to conclude from this express exception made by the Junian law with regard to the *Latini Juniani*

that this law met the case with the *Latini veteres*. A passage in Gaius 1, § 23, confirms the restriction imposed by the Junian law on the *Latini veteres* in the following terms: "Non tamen illis permittit lex Junia, nec ipsis testamentum facere, nec ex testamento alienum capere, nec tutores testamento dari." ¹ Gai. 1, §§ 22 et seq., 66 et seq. Ulp. tit. 3; tit. 5, § 9; tit. 2, § 16; and the passages quoted in the preceding note.

but to the towns of Latium, and consequently were not in the enjoyment of full Roman citizenship, but only of the *jus Latii*. These colonies were chiefly composed of Latins, or of other people, settled either by the arms or the policy of Rome in a conquered country. The Romans who enrolled themselves in these *coloniæ* forfeited their entire Quiritarian rights, and only enjoyed those peculiar to the colony.

In order to establish these colonies, a decree of the senate was not necessary. Generals or consuls could create them whenever success in war or other circumstances suggested the expediency of so doing.

189. (5.) The towns of Italy which submitted to Rome at the conclusion of the struggle, and at the total subjection that took place in the latter part of the fifth century from the foundation of Rome, remained, in virtue of treaties, free cities in alliance with Rome (*civitates liberæ, fœderatæ*). Being located at a greater distance, having joined the alliance at a later period, and having rendered and being in a position to render less assistance to the state than the towns of Latium, they in general received far less favourable conditions and fewer concessions. However, the fundamental principle of their constitution was liberty and independence. They were governed by laws made and magistrates appointed by themselves.¹ The *commercium* was conceded to them, and their territory enjoyed the rights of Quiritarian property (*dominium ex jure Quiritium*), in virtue of which they were free from the tax or annual tribute imposed upon the possessors of conquered lands, but their inhabitants could not, like the Latins, attain the enjoyment of the full privileges of Roman citizenship. Such was the germ of what is styled the *jus Italicum*, to which our attention will be more fully directed hereafter, a concession made to certain cities and colonies outside of and beyond Italy: but it must be pre-

¹ Those who in the towns either of Latium or of Italy, and at a later period beyond Italy, had adopted the Roman law, were called *civitates fundanæ* or *populi fundi*. This does not imply that they enjoyed with respect

to Rome the rights of Roman citizens, or that their inhabitants were such citizens, but it was without doubt a means of obtaining with greater ease a more liberal share in the rights of Roman citizenship.

mised that the sense in which this expression *jus Italicum* will be hereafter used does not correspond with the outline which has been here given, inasmuch as it will only refer to the condition of Italian soil as compared with that of provincial soil, but for this we must wait for the creation of provinces and the issue of the social war.

190. The allied towns of Latium or of Italy might, in virtue of their treaties, in the case of attack invoke the assistance of Rome, but they were bound to furnish a certain number of soldiers, who would be under the orders of a Roman general.

Another clause in these treaties aimed at the principle of confederation by prohibiting the peoples of these cities from holding general assemblies, and so raising a league which might prove formidable to the Romans. Each town was thus kept isolated, unity of action prevented, and Rome made the central point of political life.

191. (6.) The distinctive characteristics of municipal towns (*municipia*) did not rest, as in the former case, upon the basis of origin or geographical position, but upon the peculiar constitution of the city to which the term was applied, irrespective of its locality. Thus in Latium and Italy there were certain cities erected into *municipia*. These were cases in which communities had been in alliance, but in course of time had lost all individuality, and become merged in the Roman polity as part of its system; and as they had originally enjoyed the status of allies and confederates, and the rights secured to them by the observance of international law, they could not but remain free, and thus came to be incorporated with the *municipia*. As Rome's conquests increased, these *municipia* extended beyond Italy. By this policy of assimilation, foreign cities and conquered territories were transformed into a species of quasi-Roman communities, without becoming actually colonies, or forfeiting altogether their independent exercise of legislative functions and internal administration.

192. The signification of the word *municipium* has not at

all times been identical. It has been modified in proportion as the assimilation of municipal towns to the constitution of Rome became more and more limited. We find the trace of these changes in Festus and Paulus, and in the exposition of Verrius Flaccus, who treats of this term in three different acceptations.¹

193. The dominant idea of a municipal town is a town to which liberty of legislation and freedom of internal administration (*legibus suis utunto*) have been accorded, so long as it does not place itself in antagonism to imperial interests, nor oppose the law (*lex, formula*) which constituted its municipal existence. The greater number of the *municipia*, although they enjoyed the free exercise of their own institutions, had, like the *coloniæ*, a political system somewhat analogous to that of Rome. Thus, under the name of *curia*, they had a species of senate; under that of decurions or curiales (*decuriones, curiales*), orders answering to senators, patricians and, below these, a plebeian order; under that of *duumviri, quatuorviri*, a species of consul, and in addition ædiles, censors and quæstors for their police and local finance, offices designed to maintain the balance of power in the state just as they had at Rome, only differing in some details owing to local peculiarities. This, as regards Latium and the greater part of the Italian cities surrounding Rome, was the natural result of their all having one common origin. And the same

¹ Festus (by Paul) on the word *Municipium*: "Municipium id genus hominum dicitur, qui, cum Romam venissent, neque cives Romani essent, participes tamen fuerunt omnium rerum ad munus fungendum una cum Romanis civibus, præterquam de suffragio ferendo, aut magistratu capiendo; sicut fuerunt Fundani, Formiani, Cumani, Acerani, Lanuvini, Tusculani, qui post aliquos annos cives Romani effecti sunt. Alio modo, cum id genus hominum definitur, quorum civitas universa in civitatem Romanam venit; ut Aricini, Cærites, Anagnini. Tertium cum id genus hominum definitur, qui ad civitatem Romanam ita venerunt, uti municipia (perhaps *municipes*) essent sua (perhaps *sua*) cuiusque civitatis et coloniæ; ut Tiburtes, Prænestini, Pisani,

Arpinates, Nolani, Bononienses, Placentini, Nepesini, Sutrii, Lucentes." (The text of this last phrase is altered in such a manner as to make it difficult to render the exact sense in construing.)

We find under another word in Festus, *Municeps*, another definition derived from the first acceptation: "Item municipes erant, qui ex aliis civitatibus Romam venissent, quibus non licebat magistratum capere, sed tantum muneris partem. At Ser. filius aiebat initio fuisse, qui ea conditione cives Romani fuissent, ut semper rempublicam separatim a populo Romano haberent, Cumanos videlicet, Acerranos, Atellanos, qui æque cives Romani erant, et in legione merebant, sed dignitates non capiebant."

result was observable even in those cities outside of and beyond Italy, which, on being raised to the rank of municipia, adopted Roman institutions in order to assimilate themselves more to the sovereign city to which they were attached. And so for similar reasons, though in the free enjoyment of legislative power, their legal systems approximated closely to that of Rome, whose institutions they voluntarily adopted.¹ The *plebiscitum*, which conferred upon a town the title of *municipium*, determined the extent to which the privileges of Roman citizenship were accorded to its inhabitants. This grant was frequently expressed in general terms by laying down that the *jus Latii* should be conferred, although the grant was not in all cases the same. In some instances, all the rights of Roman citizenship as to private law, including the *connubium*, were conceded, together with the rights of Quiritarian ownership as to the soil. In others the concession was restricted to the *commercium* and the *factio testamenti*. In other instances again even the public rights of citizenship were accorded, perhaps partially, perhaps wholly, together with the capacity to hold magistracies (*jus honorum*) and to exercise the suffrage (*jus suffragii*). In all cases, however, the municipia were said to have enjoyed greater privileges than any other class of towns (*optimo jure*). Their inhabitants were citizens of two countries, of the municipality and of Rome itself. Nor were they ordinarily refused the name of "Romans," though they were unhesitatingly reminded, in case of need, of the fact that they were but *municipes*.

194. At the epoch at which we have arrived, participation in at least the public rights of citizenship was not widely extended. Cæres is the first municipal town, founded B.C. 389, as a reward for having preserved for the Romans, during the war with the Gauls, their valuables and treasures consecrated to

¹ Aul. Gell. lib. xvi. § 13: "Municipes ergo sunt cives Romani ex municipiis, legibus suis et suo jure utentes, muneri tantum cum populo Romano honorarii participes: a quo munere capessendo appellati videntur, nullis aliis necessitatibus, neque ulla populi Romani lege astricti, nisi, inquam, populus eo-

rum fundus factus est. Primos autem municipales sine suffragii jure Carles esse factos accepimus: concessimusque illis, ut civitatis Romanæ honorem quidem caperent, sed negotiis tamen alijs oneribus vacarent, pro sacris bello Gallico receptis custoditisque."

religious worship, but the right of suffrage was not accorded to it. Some recent discoveries of archæologists have fortunately placed at our disposal several valuable relics of antiquity, which enable us to form a pretty accurate idea of the *municipium* as it existed at the date of these relics.

195. (7.) We find, under the title of *prefectures* (*præfecturæ*), towns, municipalities or colonies to which Rome, while leaving to the inhabitants the free exercise of their own administration, yet sent a prefect for the administration of justice. This prefecture could merely have been temporary. The first instance we have belongs to the historical period to which we have just referred (B.C. 323), and was the result of an application made by the inhabitants themselves, who, wearied with intestine divisions, implored Rome to put an end to their unsettled condition by sending them a prefect.¹

This outline will show the different nature of the relations that existed between Rome and her colonies. Velleius Paterculus² devotes two paragraphs to the enumeration of the colonies founded by Rome, and of certain communities to which the rights of citizenship were accorded.

196. As regards the land belonging either to the Roman colonies (that is to say, the land assigned to them as colonies,) or to the allied towns of Latium and Latin colonies, or to the allied towns of Italy, and if we include the towns which were distinguished from them by the peculiarity of their constitution, the *municipia*, it was in all these cases, as a result of the privileges of citizenship, or the *commercium* only having been accorded to them, held and treated as Quiritarian property, and consequently assimilated to the *Ager Romanus*.

We must not overlook the importance of this assimilation. The proprietors of this class of soil had the territorial rights of Roman citizens (*dominium ex jure Quiritium*); they were

¹ Livy, lib. ix. § 20: "Eodem anno (481) primum præfecti Capuæ creari cepti, legibus ab L. Furio prætore datis: quum utrumque ipsi pro remedio agris rebus discordia intestina petissent."

The expressions of Festus on the word *Præfectura*: "neque magistratus suos habebant," apply to the *duumviri juri dicundo*.

² Lib. i. §§ 14 and 15.

subject to the civil law, so far as it applied to this species of property, and whereas in every conquered territory the Roman law only recognized the occupiers of the soil as tenants subject to the payment of a rent or annual tribute (*vectigal*) as the price of the enjoyment permitted to them (because the proprietary right was supposed to be lodged in the Roman people), this land, on the contrary, was held under a proprietary title, and consequently its owners were free from rent or tribute.

197. As regards personal status, the inhabitants were divided into citizens (*cives*), colonists (*Romani coloni*, or simply *coloni*), the allied Latins (*socii Latini*, or simply *Latini*), Latin colonists (*Latini colonarii*), the citizens of the municipalities, or the *municipia* (*municipes*), foreigners (*hostes*, or, in more modern language, *peregrini*), and, finally, barbarians (*barbari*).

Cives.—The title of citizen, which was originally conferred upon all the vanquished, was, at the time to which we are alluding, regarded with great jealousy. It carried with it the enjoyment of civil rights, both of public and private citizenship, the privilege of electing and being elected to magistracies, and of voting in the *comitia*. Entire cities were eager to obtain it. At first it was confined to those who belonged to Rome, or to its then narrow territory. From time to time, however, it was conferred by a *plebiscitum*; in some cases collectively to all the inhabitants of an Italian city, in others to individuals distinguished by wealth or influence.

Romani Coloni.—These colonies enjoyed the full right of private citizenship (*connubium, commercium, factio testamenti*), but had no share in political rights.

Socii Latini.—The allied *Latins*, or simply *Latins*, possessed the rights of private citizenship accorded to the city of which they were members. Generally speaking this consisted of, 1st, the *commercium*—thus we see them emancipating their sons to Roman citizens in order that by being enfranchised they may become citizens;¹ and 2nd, the *factio testamenti*, with the rights attached to the testamentary act *per æs et libram*, but

¹ Livy, 41, 8: "Liberos suos quibus manumitterentur, mancipio dabant, quibus Romanis in eam conditionem ut libertinique cives essent."

not the *connubium*, if we except the early and legendary period of Roman history. The Latins could acquire complete rights of citizenship in various ways, especially by virtue of having held an annual magistracy in their own country, or by the removal of their domicile to Rome, provided always that they left a child in their own country,¹ or by the fact of their having brought a public accusation, carried through to conviction, against a citizen for extortion. The *Latini veteres* had in addition the right of voting, provided they happened to be at Rome at the time of the sitting of the *comitia*.²

Latini colonarii.—Latin colonies held a position analogous to that of the Latins.

Municipes.—This class, called by the Romans *municipes*, and in the plural *municipes*, signifying that they took a part in the *munera*, that is to say, in the charges, functions, and consequently in the advantages of Roman citizens,³ enjoyed a personal status which varied according to the concessions made to each municipality. This status was frequently analogous to that of the Latins, the *municipia* being said to have received the right of "Latinity," but differed in different cases.

Foreigners.—Three different expressions were applied to the foreigner: he was either *peregrinus*, *hostis*, or *barbarus*. The *peregrinus* was the foreigner whose country was already under the dominion of Rome, but which did not enjoy the rights of Roman citizenship. There were a great number of this class established in Rome, and in this respect the title was applicable to the majority both of Latins and Italians. The *hostis* was a foreigner whose country had not yet submitted to the dominant power, and was therefore considered an enemy. In early times, before the commencement of Rome's grand career, every foreigner was called *hostis*, and those against whom hostilities

¹ Livy, 41, 8: "Lex sociis ac nominis Latini qui stirpem ex sese domi relinquerent debet ut cives Romani fierent."

² Ibid. 25, § 3: "Tribuni populum summoerunt: sitellaque allata est, ut sortirentur ubi Latini suffragium ferrent."

³ Varro, *De lingua latina*, lib. v. § 179: "Alterum *munus*, quod muniendi causa imperatum; a quo etiam

municipes, qui una munus fungi debent, dicti." Aul. Gell., in the definition quoted above, § 193, note: "A quo *munere capessendo* appellati videntur." Dig. 50, 1, *Ad municipalem*, 1, § 1, f. Ulp.: "Et proprie quidem *municipes* appellantur muneris participes, recepti in civitate ut munera nobiscum facerent."

were undertaken were styled *perduelles*. These are ancient expressions.¹ The *barbarus* was one beyond the limits of civilization and the scope of Roman geographical knowledge, the sphere of which however rapidly expanded. From the Cisalpine Gauls this title passed to the Gauls beyond the Alps, to the borders of the Ocean, to the island of Great Britain, to the forests of Germany, and finally to the unknown regions in the north of Asia, whose hordes were destined in after years to overthrow the Roman empire.

These were the relations in which the *peregrinus*, the *hostis* and the *barbarus* stood to Rome: the one in her bosom, or at least under her dominion; the other, beyond the pale of her influence; and the third, outside the limits of the empire and beyond the reach of its civilization.

PUBLIC LAW

(FROM THE TIME OF THE TWELVE TABLES TO THE SUBMISSION OF ALL ITALY).

198. We have been considering the whole body of Roman citizens under three heads—the people, the senate, and the king. We shall now consider them under another tripartite division—the people, the senate, and the plebeians.

At the period at which we have arrived the order of the knights has grown in strength and importance, but has not yet attained to the full enjoyment of the privileges and the power which it is destined hereafter to exercise. The people, as a political class, must be regarded as composed of the whole body of citizens without respect to rank or fortune. The senate, as of persons inscribed by the censors in their lists as members of that body. The plebeians, no longer excluded from the enjoyment of political rights,

¹ Varro, *De lingua latina*, lib. v. § 3: "Et multa verba aliud nunc ostendunt, aliud ante significabant, ut *hostis*, nam tum eo verbo dicebant peregrinum, qui suis legibus uteretur, nunc dicunt eum quem tum dicebant perduellem." Festus, on the word *Hostis*:

"Hostis apud antiquos peregrinus dicebatur, et qui nunc hostis perduellis." Dig. 50, 16, *De verborum significatione*, 234, f. Gaius: "Quos nos hostes appellamus, eos Veteres perduelles appellabant, per eam adjectionem indicantes cum quibus bellum esset."

have now their assemblies and their own laws; they take a part in the government, are eligible to the principal civil magistracies, are enrolled amongst the knights, and classed with senators.

199. The people, the senate and the king no longer monopolise all the power in the state. Magisterial offices have been multiplied; the sovereignty of a single ruler has given place to the consulate of two; the consulate in its turn has disintegrated and given birth to the offices of the censor, the prætor and the ædile major; the plebeians are headed by their tribunes, and, in addition to these, there are the inferior magistrates, the questors and the plebeian ædiles. All these offices, except that of censor, are annual: some confer the right of the curule chair and images (*sella curulis, imagines majorum*); others enjoy neither of these distinctions, and the subordinate magistrates are styled *magistratus pedarii*.

The distinction of the curule chair consisted in the privilege of being carried and seated upon a chair of honour, and was enjoyed both during the tenure of office and after it had been vacated.¹ The dignity of the "images" was a right which some enjoyed to bequeath to their family their images or busts. These statuettes were representations of any member of a family who had filled any high magisterial office, and it was a point of honour to preserve them. In funeral processions they were carried in state to show the distinction to which the family of the deceased had attained.²

¹ C. Flavius, who published the "Dies Fasti," being an ædile, went to visit his colleague who was ill. There happened to be a number of young patricians present. Seeing the ædile coming, they agreed that no one should rise on his entrance. The little plot was carried out; but Flavius, who noticed what they were about, ordered his attendants to bring in the curule chair, and mounted on that elevated seat of honour he confounded, by the *clat* of the magistracy, those who had attempted to humiliate him. (Livy.) I relate this anecdote because it exhibits both the light in which the patricians regarded the admission of the plebeians to the high magistracies, and

the respect which was paid to the external symbols of office.

² These images were not simple portraits, nor were they merely full length figures. There are grounds for believing that, at least in the funeral procession, some person assumed the character, the robes of office and insignia of the deceased, and played his part so that it might appear that the deceased was present in the procession. But be this as it may, the representation of the ancestors of the deceased following the funeral car in their curule chair, must have looked as if they were conducting to the tomb with pomp the deceased whom death had associated with them. We cannot wonder

200. THE LEGISLATIVE POWER. This was exercised by the people, the senate and the plebeians; by the people and the senate in enacting *leges*, the one voting the other initiating; by the plebeians in their *plebiscita*.

We must say a few words upon these three sources of law—the *leges*, the *plebiscita*, and the *senatūs consulta*.

First, the *leges* were enacted by the *comitia centuriata*, for we may regard the curies as having only a fictitious existence, and constituting a machinery merely for the investiture of the *imperium*, or in connection with the determination of certain family rights for which ancient custom rendered the confirmation by the curies necessary. The province of the senate was to concur in the enactment of laws. Projected laws were usually prepared and discussed by it; the *comitia* were convoked by a senatorial magistrate with their authority, and by him the laws were proposed. The centuries, on their part, had no power to make any alteration whatever in the proposed law. Each citizen in passing before the scrutineer simply pronounced an affirmative or a negative in favour of or against the proposed enactment, and the vote was given audibly. An inauspicious omen, or the sound of thunder, could at any time dissolve the assembly. (*Jove tonante cum populo agere nefas.*) The *auctoritas* of the senate, as given to the decisions of the *comitia centuriata*, was a mere form, for after the *lex Publilia* was passed, that *auctoritas* had to be given before the votes were taken.

Secondly, the *plebiscita* emanated from the plebeian assemblies convoked by tribes in the forum or Capitol, the tribunes having the initiative; the vote was given audibly, as in the case of the centuries, and after the Publilian and Hortensian law came into force neither the vote of the centuries nor the sanction of the senate was necessary to make the *plebiscita* binding upon both orders.

at the Romans so accurately distinguishing between the old and the new families, since at each funeral procession the dead and the living were thus reunited. When two or three only of these deceased consular dignitaries appeared in the procession, the paucity of

the number attested publicly the recent origin of the family; but where a long line of ancestors appeared in the funeral cortège, they represented the dignity of a race which was able to trace its origin to the earliest periods of Rome.

Thirdly, the authority of the *senatûs consulta*, so far as relates to the government and the higher branches of the administration, is indisputable, but Roman jurists question their authority in matters of private law, even at a later date; and the few of this description quoted relate to some public matters besides.¹

201. To these sources of the written law must be added others derived from customary law, such as the interpretation and authority of the jurists (*interpretatio*), opinions of the bar resulting from discussion, litigation and decisions (*disputatio fori*), usages long observed though unwritten, and especially those handed down from antiquity (*mores majorum*), which were always regarded as binding. Laws of this kind, says Pomponius, had no categorical appellation, as was the case with the *leges*, the *plebiscita* and the *senatûs consulta*, and were only distinguished by the generic term *jus civile*,² a term applicable to all the laws peculiar to citizens, but here used in a technical sense.

Finally, in order to have a complete picture of the elements of legislation at this period it is necessary to add the *actiones legis*, for notwithstanding the fact that the formulas attached to the different classes of suits had been published by Flavius, they nevertheless continued to comprise a separate department or branch of the law.

202. EXECUTIVE POWER. Properly speaking, the entire executive power as to deliberation and determination of matters affecting the superior departments of the administration was lodged in the senate; its action, however, was not in every case direct, inasmuch as it was frequently exercised through the intervention of senatorial magistrates. It directed the consuls

¹ Whenever a plebeian tribune interfered by his veto with the decision of the senate, it was then called a *senatûs auctoritas* and not *senatûs consultum*.

² "His legibus latis cœpit, ut naturaliter evenire solet, ut interpretatio desideraret prudentium auctoritate necessariam esse disputationem fori. Hæc

disputatio et hoc jus, quod sine scripto venit, compositum a prudentibus, propria parte aliqua non appellatur, ut cæteræ partes juris suis nominibus designantur, datis propriis nominibus cæteris partibus: sed communi nomine appellatur Jus civile." Dig. 1, 2, *De orig. juris*, 2, § 5, f. Pomp.

and the prætors, imposed conditions upon vanquished nations, rewarded or punished the colonies and the allies according as they merited the pleasure or displeasure of Rome, and determined disputes in cases where nations were the litigating parties. The senate was not inaptly described by the eulogy of Pyrrhus "as an assembly of kings."

203. The executive magistrates personally and directly charged with the duties of the administration were: 1st, The consuls, who not only held sway in Rome, but one of whose special functions was the command of the army; 2nd, The two urban prætors, who, independently of their judicial office, could act for the consuls during their absence from Rome, and also in their turn, when necessary, be replaced by the consuls; 3rd, The two censors, who conducted the census, arranged the citizens in classes and fixed the rate of taxation for each; 4th, The two *ædiles majores*, who superintended the higher departments of the police administration; and 5th and finally, The quæstors and plebeian ædiles, though, properly speaking, these were but magistrates of a particular class.

204. The plebeian tribunes, who were elected by the tribes, at the period to which we are referring, to the number of ten, that is, two for each class as determined by the census,¹ were not exactly part of the executive administration, but were intended to act as a sort of balance of power within the state. They were not, in the sense in which the word was understood by the Romans, magistrates exercising any actual executive functions or jurisdiction (*imperium, jurisdictio*). While the consuls enjoyed the *imperium*, the authority which the tribunes exercised, called the *auxilium*,² only empowered them to offer,

¹ Livy, lib. ii. § 58: "Tum primum (an. 283) tributis comitiis creati tribuni sunt; numero etiam additos tres, perinde ac duo antea fuerint, Piso auctor est." Lib. iii. § 30: "Tricesimo sexto anno a primis tribunis plebis (an. 297), decem creati sunt, bini ex singulis classibus: itaque tantum est ut postea crearentur."

² Livy, lib. vi. § 37: "Non posse æquo jure agi, ubi imperium penes illos

(consules), penes se (tribunos) auxilium tantum sit." Lib. ii. § 83: "Quibus (tribunis) auxilii latio adversus consules esset." Cicero, *De legibus*, lib. iii. § 3: "Plebes quos pro se contra vim, auxilii ergo, decem creavit." Claude, from the *Tables of Lyons*: "In auxilium plebis creatos tribunos." Festus, on the words *Sacer mons*: "Sacer mons appellatur trans Anienem

individually, their support or opposition to measures put forward either by the consuls or by other magistrates. Their support consisted in merely abstaining from interference when any measure was put forward of which they approved. Their opposition was called *intercessio*, and might be exercised with reference to any action taken by their own colleagues.¹ This power of *intercessio* extended even to the decrees of the senate; and as at the time we are speaking of the tribunes had not been admitted into the senatorial body, they used to be seated, as Valerius Maximus says, upon their bench before the door of the hall, where they carefully examined the decrees which were there submitted to them, and marked with the letter T those which they purposed allowing to pass without opposition.² Their authority, however, was soon to extend. They had in fact already begun to take a more active part in the government, as it was they who convoked the *comitia* by tribunes and introduced *plebiscita* (*rogationes*). They summoned before them citizens and even magistrates, and more than once they had condemned consuls, upon laying down their consulate, who during their office had proved themselves hostile to the interests of the plebeians. The senate, in calling them to their aid in order to restrain the consuls from nominating a dictator in B. C. 432, had given them a coercive power of which they were not slow to avail themselves. And this was the origin of the *potestas* or *vis tribunicia*³ which occupies so important a place

paulo ultra tertium miliarium; quod eum plebes, cum secessisset a patribus, creatis tribunis plebis, qui sibi essent auxilio, discedentes Jovi consecraverunt."

¹ The patricians frequently interfered by means of *intercessio* with the acts of plebeian tribunes of which they disapproved. See in Livy, lib. vi. § 38, the case of the tribunes C. Licinius and L. Sextius, who refused to yield to the *intercessio* of their colleagues, and the efforts of M. F. Camillus, irregularly elected dictator by the patricians, to support this *intercessio*.

² Val. Max. lib. ii. ch. 8, § 7: "Illud quoque memoria repetendum est, quod tribuni plebis intrare curiam non lice-

bat; ante valvas autem positos subselliis, decreta Patrum attentissima cura examinabant, ut, si qua ex eis improbassent, rata esse non sinerent: itaque veteribus Senatus consultis T littera subscribi solebat, eaque nota significabatur, illa tribunos quoque censuisse."

³ Livy, lib. iv. § 26: "Vos, inquit, tribuni plebis, quoniam ad extrema ventum est, Senatus appellat, ut in tanto discrimine reipublicæ dictatorem dicere consules pro potestate vestra cogatis." Qua voce audita, occasionem oblatam rati tribuni augendæ potestatis accedunt, proque collegio pronuntiant: "Placere consules Senatui dicto audientes esse: si adversus consensum amplissimi ordinis ultra tendant, in vincula

in the political history of Rome, for when once the tribunes had been invested with this power they took care to retain and to improve the advantage thus gained.

205. ELECTORAL POWER. The people and the plebeians exercised the privilege of electing different magistrates. The people, assembled by centuries, created consuls, prætors and the *ædiles majores*. The plebeians nominated the quæstors, the plebeian *ædiles*, and especially the plebeian tribunes. They also elected the *Pontifex Maximus* from among the College of Pontiffs, whenever a vacancy occurred, for this office was held for life. Here we find a remarkable instance of a symbolic ceremony being retained long after the reality was gone. The election of the *Pontifex Maximus* belonged originally to the curies, and when the privilege came to be conferred upon the tribes, it was necessary that there should be a curial law to sanction the election. And this respect for ancient usage was also evinced by retaining the thirty lictors, each representing one of the thirty old curies, and the augurs, who conducted the religious ceremonies, the lictors adopting that which the tribunes had already determined upon.

206. JUDICIAL POWER. This power was in the hands of the people, the plebeians and the prætors; but we must distinguish between jurisdiction in civil and criminal matters. In criminal matters the jurisdiction was in the *comitia centuriata* and the *comitia tributa*: in the quæstors, as commissioned by the *comitia*; in the senate, as commissioned by the *comitia*, and as acting on its own inherent authority according to the nature of the case; in the consuls and prætors, as commissioned by the senate. The *comitia centuriata* could alone pronounce sentence of death; the *comitia tributa* that of exile or fine, chiefly as a political punishment. If it happened to be a matter of some public offence to which the attention of the citizens

se duci eos jussuros.'" Lib. v. § 9:
"Inter hæc tribuni plebis . . . feroces
repente minari tribunis militum, nisi in

auctoritate Senatus essent, se in vincula
eos duci jussuros esse."

was directed, and in which the accused was a magistrate, or consular dignitary, the centuries or the tribes very rarely remitted their right to any other body. If the accused person was in a humble position in life, or the offence with which he was charged was a trivial one, or a private crime, they generally delegated their power to a *quæstor parricidii*, and the senate also in such cases generally commissioned a quæstor or magistrate to try the prisoner, the people very rarely claiming their privilege. And in the case of foreigners or slaves or other persons who were not in the enjoyment of the rights of citizens, or where it was merely a matter which required some slight penalty, the prætor was the proper person to try it. The centumvirs also appear to have had some criminal jurisdiction, but we know very little of its nature and extent.

207. In civil cases the action was commenced before the prætor, in whose presence all the religious formulæ of the *legis actiones* were performed and the suit organized. It was he who had the *jurisdictio* (*jus dicit, addicit, edicit*), and the public authority (*imperium*). The formalities having been gone through before him (*in jure*), if the matter was such as could not be determined by him, that is to say, by a simple declaration of the law, he appointed either a single judge, or one or more arbitrators, who were selected from the senatorial order, or agreed upon by the parties, or ascertained by lot, to determine the matter. In certain instances he remitted the case to the centumviral tribunal to be heard either by the whole chamber, its four sections sitting together, or by one or more of them. The centumviral tribunal took cognizance of state matters, questions of Quiritarian property and succession; the judge or arbitrator of matters of *obligatio* and *possessio*. In cases in which strangers were concerned, who could not have recourse to the *actiones legis*, the parties were remitted by the magistrate to recuperators, selected at the time, usually either three or five in number, from among the people who happened to be on the spot.

208. M. Laboulaye, in his *Essai sur les lois criminelles des*

Romains concernant la responsabilité des magistrats, has traced, in a most interesting manner, the machinery by which the political equilibrium in the republic was maintained. He has shown how the different powers, which were ill-defined and allowed of the principle of reciprocal action, were yet kept in harmonious co-operation ; how the magisterial offices, which, for the most part, ran two or more abreast of one another, yet worked without clashing ; how the magistrates themselves, some of whom resembled a class of hierarchs enjoying the dignity of their caste, but without actual authority, such as a superior has over an inferior, carried on the duties of their office ; and how, in a state where every official was independent and irresponsible during the tenure of office, and where all the different parts of this system were constantly coming into contact, the whole machinery of the administration was yet maintained in good working order.

One of the chief instruments of this equilibrium in the state machinery was the principle by which two or more magistracies existed co-extensive and parallel with one another, the right of veto and power of check which each magistrate might exercise upon his brother official whether equal or inferior, and which the tribunes of the plebeians might exercise over all magistrates and even the senate. Thus, though without having actual authority one over another, the one was able to control, to check or annul the acts of another. They thus came into frequent contact, and although each could act separately, yet all being similarly situated in this respect, they were obliged to act in concert, or at least to ascertain that they were not likely to be opposed or interfered with before they could be sure that their proceedings would not be annulled. And in this manner, even in the case of the colleague of a consul, a censor or a plebeian tribune, there was a check and a safeguard against abuse of authority, against injustice or arbitrary power. This principle, instead of resulting in establishing equilibrium in the machinery of the administration, might have degenerated into a mere obstacle to all progress, had it not been that public spirit, attachment to national institutions, and reverence for precedents, prevented the system from being abused.

209. The process by which an individual plebeian tribune or a magistrate could intervene to arrest the action or decision of a colleague or of any other authority, equal or inferior to his own, was styled, as we have already seen, *intercessio*, *intercedere*, and the fact of demanding the interference of a tribune or of a magistrate was called the *tribunum appellare*, *collegam* or *magistratum appellare*.¹ These proceedings, combined with the *provocatio ad populum*, originated the institution of appeal (*appellatio* or *provocatio*), an institution which underwent certain modifications under the emperors. That is also the origin of our word "appeal," which we have to a certain extent diverted from its original grammatical signification, usage having familiarized the idea of "appealing to a superior judge," instead of "appealing the superior judge."

As regards the *intercessio* as it existed under the republic, Cicero in his treatise *De legibus* has given us an example of the formula in these words: "*Par majorve potestas plus valet*," and he adds, to check an abuse by intercession is the act of a good citizen, "*Intercessor rei malæ salutaris civis esto*."²

SACRED LAW.

210. Sacred law, whose influence on the government and on the civil law was always felt and frequently exercised, had also undergone several changes.

After the abolition of the regal power, the functions of

¹ Livy, lib. ii. § 27. In early Roman history, under the consulate of P. Servilius and Appius Claudius, in a case where the latter acted harshly towards a debtor, the debtor happening to be a soldier, appealed to his colleague. "Quod ubi cui militi inciderat collega appellabat." And at a later period (lib. iii. § 36), when speaking of the second decemvirate, which had suppressed not merely the *provocatio ad populum* but also the *intercessio*, which had not been interfered with by the first decemvirate, he says: "Nam, præterquam quod in populo nihil erat

præsidii, sublata provocatione, intercessionem quoque consensu sustulerant: quum priores decemviri appellatione collegæ corrigi reddita ab æ jura tulissent; et quædam, quæ sui iudicii videri possent, ad populum rejecissent." Further on (lib. iv. § 26): "Vos tribuni plebis Senatus appellat." See § 181, note 2. See also Dig. 49, 1, *De appellationibus*, 1, § 3, f. Ulp.: "Cum alium appellare deberet alium appellaverit—Præfectum urbis appellasset."

² Cicero, *De leg.*, lib. iii. § 4. See also § 3.

Pontifex Maximus, which had been exercised by the kings, became a distinct office, the election to it being made by the tribunes and confirmed by the curies. It differed from other magistracies, inasmuch as it was for life and not annual. The Pontifex Maximus had the dignity of the curule chair and "images," and a tribunal, where he determined all matters connected with religion. He was the custodian of the annals of historical events, which he recorded by entering them in tables. These tables, which were exposed to view in his residence, were known as the *Annales Maximi*. The eclipse of the sun which took place on the 5th June, B. C. 399, and which was entered in these Annals, and from which astronomers made their calculations as to the dates of eclipses which had taken place as far back as the reign of Romulus, as we learn from Cicero (*De republica*), fixes a date from which historical critics cannot question the existence of these Annals, or the fact that Roman authors could avail themselves of such calculations.¹

At the period at which we have arrived, the College of the Pontiffs had been increased and its number raised to eight, that of the augurs to nine, and the plebeians had become eligible to these offices.

CIVIL LAW.

211. The civil law, in its relation to persons, things, property, wills, successions, contracts, and *actiones legis*, is stamped, in each case, with features of an essentially Roman character.

212. PERSONS. Under this category are classed the rights exercised by men, whether heads of families, that is, *sui juris*, or, *alieni juris*, that is, subject to another; the authority over slaves; paternal power, *potestas*; marital rights, *manus*. All

¹ Cicero, *De republica*, lib. i. § 26: "Qui (Ennius) ut scribit, anno CCC. quinquagesimo fere post Romam conditam,

. . . Nonis Junis soli luna obestit et nox. Atque hac in re tanta inest ratio atque

sollertia, ut ex hoc die quem apud Ennium et in Maximis Annalibus consignatum videmus, superiores solis defectiones reputatæ sint usque ad illum quæ nonis quintilibus fuit regnante Romulo."

these at the period at which we have arrived were still intact and in the condition we have shown. In addition to these, we have the *mancipium*, or the rights acquired over the freeman who has been purchased, and over the debtor who has been adjudged to his creditor by the magistrate in payment of a debt or for the reparation of any damage, *addictus* (after the Papirian law the condition described by the word *nexus* ceased to exist)—*agnatio*, the civil bond confined to the relationship existing between the members of the same family, and entirely distinct from the relationship by blood, *cognatio*—the *gentilitas*, or the agnation of families, which had been from the earliest times *ingenui*, or free from the taint of vassalage, a species of civil parentage which had relation to clients or the enfranchised derived from clients—and, finally, the perpetual tutelage to which a female was subject during her entire life.

213. THINGS. Under the head of things and property we have *res Mancipi*, and *res nec Mancipi*, the two classes of things according as they were or were not susceptible of mancipation—the *mancipium* or ownership of a Roman citizen, Quiritarian tenure, relating to ordinary property, and indestructible except by legal process (*mancipatio*, *in jure cessio* or *addictio*, *adjudicatio*, *usucapio*, *lex*, according to the Quiritarian law—*traditio* according to the *jus gentium* for things *nec Mancipi*); so that he who had delivered to another or had abandoned a thing could nevertheless, within a certain time, if it was a *res Mancipi*, recover it unless it had been alienated in the form required for the transfer of that class of property.

214. TESTAMENTS (WILLS). The absolute liberty enjoyed by the head of a family of disposing at will of all his property, even including that acquired by the members of his family, and without their interference—forms of will which heretofore had required a decree of the curies to validate them (*testamentum calatis comitiis*), but at this period were made by a solemn and fictitious sale of the inheritance (*testamentum per æs et libram*, *per mancipationem*).

215. SUCCESSION. This was the right of inheritance, not according to the ties of blood relationship, but to those of civil connection (*agnatio, gentilitas*). The son transferred from his family lost all rights in connection with it, neither could the mother succeed to the child, nor the child to the mother.

216. CONTRACTS. The ceremony *per æs et libram*, or the *mancipatio*, generically the *nexum*, was the mode of contracting obligations as well as of transferring property, inasmuch as the words pronounced in this formula (*mancipatio*) constituted the binding transaction between the parties (*lex Mancipii*); subsequently a new form of contract was introduced, the contract *verbis* (or *sponsio, stipulatio*). This was the first offshoot from the *nexum*, inasmuch as the words were detached from the ceremony, the weighing *per æs et libram* being held as performed, and the parties confining themselves to the formal question and answer, in Quiritarian phraseology, that being alone admissible and exclusively peculiar to Roman citizens: *Spondes-ne? Spondeo*. Every form of contract not conducted with this form of the *nexum* or the *sponsio* failed to produce any obligation; the sale (*venum datio*), the letting and hiring (*locatio conductio*), the bailment (*man-datum*), the partnership (*societatem co-ire*), not constituting a binding contract (as their respective denominations clearly indicate), except by the part performance of one of the parties to the agreement, and not by the simple agreement itself.

217. The ACTIONES. Under this head are classed the representative symbols, the sacerdotal acts and consecrated formulas in the four *legis actiones*—the *sacramentum* and the *judicis postulatio*, in the institution and conduct of suits—the *manus injectio* chiefly, and the *pignoris capio* exclusively, as forms of execution; the suit was dismissed, and the claimant deprived of redress, if he failed to observe accurately every detail of formality, without the power of reinstituting the suit.

218. Such were the elements and characteristics peculiar to Roman law, and not to be found in any other legal system.

.. We have arrived at the middle of the republican period, when Rome still enjoyed the full vigour and hardihood of early youth, strong in the freshness of the first principles of its constitution and the success of its arms ; but we have approached the extreme limit of this epoch. Successful military enterprise in distant lands was followed by the increase of wealth and the growth of luxury. With the consequent influx of foreigners came a recognition of the principles of the *jus gentium* and the prætorian laws, gradually superseding the public and the Quiritarian civil law.



MANNERS AND CUSTOMS.

219. The early customs connected with the legal system of the Romans had been at the epoch at which we have arrived for the most part transformed into laws. There were, however, several ancient usages in vogue which are worth attending to, inasmuch as they serve to depict some characteristic features of the age. Thus, for instance, we find leaders devoting themselves to the gods for the sake of the republic, in order that the legions and auxiliaries of the enemy might be involved in the same fate ;¹ dictators laying aside the sword in order to return to the plough, and resigning the command of an army to attend to the cultivation of their fields ; and consuls receiving the envoys of foreign nations seated at a rustic table decorated with vases of clay. We find luxury controlled by sumptuary laws, and, what is of infinitely greater importance, by public opinion, so that a consul was branded by the censor because he possessed a silver vessel weighing ten pounds. Purple was scarcely permitted upon the official robe of the magistrate, the *prætecta*² was forbidden to the simple citizen, and the toga to which he was entitled could neither be worn by the slave or the foreigner ;

¹ Livy, lib. viii. § 9 : "Deorum opus est. Agedum, Pontifex publicus populi Romani, præi verba, quibus me pro legionibus devoveam." And under the direction of the Pontifex Maximus he pronounces a sacred formula in the

terms recorded by Livy.

² We must not confound the *prætecta* of the magistrate with that of the youth between the age of twelve and the time when as a citizen he assumed the *toga virilis*.

hospitality was exercised in the most simple fashion, and every feature in the social condition of the state was stamped with the double impress of vigour and poverty. But as in the case of law, so also in that of the manners of the people, the period at which we have arrived in the history of Rome was soon to be followed by an era of progress. The riches of Tarentum and of Italy were preparing the way for the reform ; while, on the other hand, the decline of the patriciate and the elevation of the plebeians resulted in the displacement of certain ancient landmarks of custom ; clientage had begun to decline preparatory to its total decay ; the bond of union which it produced was becoming relaxed, and the utility of the institution decreasing. A large portion of the plebeians had become altogether independent ; as new comers they were no longer of necessity attached as in the early days of Rome to a patron, and the adoption of the allied towns and entire provinces as clients, in the place of citizens, by the great, was coming into vogue.

III. FROM THE TOTAL SUBJUGATION OF ITALY TO THE EMPIRE.

220. History records few instances of a sudden revolution in the political laws of a state ; an abrupt change in the manners of a people is a phenomenon never witnessed. It is true a superficial observer may believe in the occurrence of such revolutions, for he only sees events when they have become conspicuous to all mankind ; but the judicial mind, that takes notes of causes and calculates their effects, will never be so deceived. At this epoch the Romans were flushed with the glory of success. Italy had already acknowledged their sway, and another century was to see it extended over Africa and Asia. But we must not overlook the fact that they did not always retain the primitive simplicity and the austere manner of former days, nor leap suddenly to that height of power, where in the plenitude of their prosperity, and in the pride of art, luxury and wealth, they could cease to regard the virtues of self-restraint and magnanimity.

The remaining period of the republic which we have to consider may be divided into two portions. The first terminates with the destruction of Carthage, Numantia and Corinth. The other, commencing at that period, reaches down to the empire. During the former of these two periods events are preparing the way for the second. Every fresh victory increases the wealth of the victors; the number of slaves is multiplied, and habits of luxury are encouraged by a growing familiarity with the habits of the conquered nations. Occasional defeat, the panic caused by the approach of Hannibal to the gates of Rome, and the thirst for universal dominion, keep alive sufficient public spirit to prevent absolute degeneracy. Here, too, the austerity of the early days is to be seen side by side with the effeminacy of a later age, the old citizen with the new. We find censors ordering the erection of magnificent porticoes for a theatre, and a consul directing them to be demolished. We find luxurious habits in dress, extravagance and luxury at the table being introduced, while sumptuary laws become a thing of the past. Orators, stoics and epicureans disseminate the principles of their respective schools, while the senate, by its decrees, denounces them. As the success of Roman arms increases the purity of morals declines, and, in proportion as Rome is victorious, she becomes corrupt.

221. As regards the political history of this period, it may be summed up, if I may be allowed so to state it, in the following scheme. From the expulsion of the kings to the subjugation of Italy there was an internal struggle for supremacy between the two classes—patricians and plebeians; there was a struggle without upon the issue of which depended the fate of Italy. From the date of the subjugation of Italy to that of Africa and Asia, the internal conflict had ceased, for the plebeians were supreme, but externally the struggle for universal dominion continued to rage. From the time when that object had been attained to the overthrow of the republic, the annals of Rome record no important wars, but she was again rent by internal dissension, and civil war instituted for the personal aggrandizement of some general, consul or dictator. A

contest carried on for such a purpose can have but one termination. The natural hatred and animosity kindled by such a struggle can result in nothing short of the triumph of one leader and the destruction of his opponents—in other words, it leads to empire. Let us trace these events, the sources of which we have thus indicated, a little more in detail.

SECTION XL.

PRÆTOR PEREGRINUS.

222. B.C. 266. The attachment of Italy to Rome was speedily followed by the extension of its commercial relations. The crowds of foreigners who flocked to the capital, to practise mechanical arts or to follow the commercial pursuits which the citizens despised, brought with them new objects and new wants, followed by new agreements and new disputes, and it is without doubt to this epoch that we must refer the creation of a new magistracy called the *prætor peregrinus*, or prætor of the stranger. A passage in Lydus¹ fixes the date of the institution of this office in B.C. 247. The jurisdiction of this magistrate extended to all matters between foreigners or between a foreigner and a Roman citizen (*plerumque inter peregrinos jus dicebat; inter cives et peregrinos jus dicebat*). He did not apply to foreigners the rules of the civil law, that is to say, those which were exclusively confined to Roman citizens, but he applied to them the rules of the *jus gentium*, or, in other words, the law applicable to all men.

The dignity of urban prætor ranked infinitely higher than that of *prætor peregrinus*: for example, the urban prætor had the distinction of the lictors which the *prætor peregrinus* had not.² Notwithstanding this, however, these officers, when necessary, could act for each other.

223. From B.C. 264 to B.C. 146. After the whole of Italy

¹ Lydus, *De magistr.*, 1, § 45.

² Pomponius places the creation of certain magistrates, such as the *tribuni ærarii*, the *triumviri monetales*, and

the *triumviri capitales*, subsequent to the creation of the prætor peregrinus. Dig. 1, 2, *De orig. jur.*, 2, §§ 30, 31, f. Pomp.

had been subdued, the Roman arms were carried beyond her border, and it will be as well to glance at the condition of the then known world. In Europe, to the north, the country inhabited by the Gauls and Germans was almost unknown. Of those immediately in the neighbourhood of Italy, Illyria belonged to its aboriginal races; Sicily to the Carthaginians and to the kings of Syracuse; Sardinia and the islands of the Mediterranean, for the most part, to the Carthaginians; Macedonia to the successors of Alexander; Greece existed in the form of a number of confederate states. The southern Spanish seaboard belonged to the Carthaginians, whereas the interior of Spain was still in the possession of its aboriginal inhabitants. In Africa there were the Carthaginians, the Numidians, the Egyptians. In Asia the empire of Alexander was divided into numerous kingdoms. From this, it is easy to see, that the Carthaginians had, at this time, a dominion more widely extended than other nations, and that its influence, in several directions, extended to Italy; this power therefore naturally became Rome's first rival. It happened that the king of Syracuse implored the aid of the Romans against the Carthaginians; the Romans availed themselves of the opportunity to interfere, and the struggle between these two great powers commenced in Sicily. It occupied a space of more than a century, and finally resulted in the ruin of Carthage. The intervals of repose which the contending parties permitted each other to enjoy divide this lengthened struggle into three parts, which are known to historians as the three Punic wars.¹

¹ The first Punic war lasted from B.C. 264 to B.C. 241. It was then that Regulus conducted the legions to the neighbourhood of Corinth, where they were destroyed by the Macedonian general Xantippus. The high-souled devotion of the illustrious prisoner who was deputed to Rome will remain an example to all ages of public spirit and chivalrous honour. The war terminated after a twenty-four years' struggle by a naval engagement, in which the Carthaginians, after losing more than a hundred vessels, submitted to the conditions imposed upon them by the Romans. Between the first and second

Punic wars there was an interval of twenty-three years, during which a great portion of Illyria was subdued, and the Gauls, who again made their appearance within a few days' march of Rome, were, as before, cut to pieces.

The second Punic war commenced in the year B.C. 218 and terminated in the year B.C. 196. The passage of Hannibal across Spain and Gaul in order to make a sudden descent upon Italy, the disasters and checks experienced by the Romans till the battle of Cannæ, the lustre of such generals as Scipio Africanus the elder, the diversion to which he had resort in making a descent upon

The record of this eventful period contains some features which are new to the history of Rome; the mention of fleets, of tempests, of shipwrecks, first appears in the annals of its defeats and victories. The result of each of the three Punic wars was advantageous to the Romans, who did not lay down their arms till they were in a position to dictate conditions to their enemies. The first war left them in possession of Sicily; the second in that of Sicily, Sardinia and Spain; and the third in that of Sicily, Sardinia, Spain, and Carthage in Africa. In the intervals between the Punic wars, while the Carthaginians were enjoying repose, the Romans had successively repulsed the Gauls, made themselves masters of Cisalpine Gaul, subjected Illyria as far as the Danube, and made their appearance in Greece.

Contemporaneously with the three struggles with the Carthaginians, the three great Macedonian wars took place, which terminated in the conquest of Macedonia, against which the Romans had taken up arms in the cause of Greece, as well as of Greece itself, whose cause they had at first espoused; and, finally, the war in Asia against Antiochus gave them the possession of Asia Minor to the confines of Greece. All these conquests were achieved in the same year, and the only countries that remained free from the Roman yoke were the distant territories of Transalpine Gaul, Germany, Egypt, the interior of Asia, Thrace, Parthia, and India.

224. There are certain legal institutions and reforms belonging to this period—upwards of a century—of conquest which

Africa, all give to this period of Roman history a charm and an interest which it will never lose. The war was terminated by the battle of Zama, when Hannibal was compelled to yield to Scipio, and Carthage to accept from Rome a treaty the terms of which were much less favourable than those from which she had sought deliverance by arms.

Fifty-one years passed between the second and the third Punic war, during which period the first and second Macedonian wars took place, in which Philip

in the first instance, and his son Perseus in the second, were successively vanquished.

The third Punic war broke out in the year B.C. 150, and terminated in the year B.C. 146 by the ruin and destruction of Carthage under Scipio, grandson of Scipio Africanus, who was surnamed the second Africanus. The same year also the third Macedonian war was concluded. Corinth was destroyed in Greece, Numantia in Spain, and Asia Minor was to a considerable extent subdued.

deserve notice: such as the establishment of the provinces, the increase of the number of prætors, the creation of the proconsuls and proprætors and of certain other magistrates, the introduction of the practice of the *responsa prudentum*, and, finally, the abolition of the *actiones legis*.

SECTION XLI.

THE ESTABLISHMENT OF THE PROVINCES.

225. Of the new countries that came under Roman sway, some were attached to the conquering state by treaty; others, and the greater part, were reduced to the condition of provinces.¹ Among these were Sicily, B.C. 241, Sardinia, B.C. 228, Cisalpine Gaul, Illyria, Spain and Carthagina in Africa. Each province was under the direct domination of Rome, and governed by Roman magistrates according to the terms of the *plebiscitum* or the *senatûs-consultum* which had regulated its condition (*formula provinciæ*). It was a principle of the law of conquest among the Romans that the ownership in the soil of a conquered country, even as to that portion of it which was left to the enjoyment of its original inhabitants, passed to the conqueror, the former ceasing to be proprietors and having only the status and rights of occupants. As a price of the possession conceded to them by the Romans, and as a proof or mark of their superior title, the conquered people were subjected to the payment of an annual rent, *vectigal*.

In addition to this payment, which was a tax on the provincial soil, the inhabitants were also called upon to pay a personal impost or tribute, and they were then not citizens but subjects and tributaries.

226. As between each other, the distinctive features of the different provinces varied in accordance with the laws which

¹ Festus, on the word *Provincia*: "Provinciæ appellantur, quod populus Romanus eas provicit, id est ante vicit." Niebuhr substitutes for this another

rendering not less equivocal, and derives the word from *proventus*, on account of the tribute or revenue exacted from the provinces.

gave to each its individual organization. And the towns and different localities of the same province also possessed each its peculiar characteristics. Colonies, both Roman and Latin, were founded in them; and even free cities erected into municipalities and enjoying their own government with a greater or less share in the rights of Roman citizenship, either with reference to the people or to the soil, were allowed to exist. At other times *præfecturæ* were established in which justice was administered by a præfect sent from Rome. As to the condition of these different cities we must refer the reader to what has been already said.¹ All land which had received the privilege of Quiritarian ownership (*dominium ex jure Quiritium*) ceased *ipso facto* to be provincial soil, and its possessors, in the full enjoyment of proprietary rights, could dispose of it according to Roman law, and were free from *vectigal* or the annual rent peculiar to the tenancy of provincial soil.

The entire province was, without doubt, under the general supervision of the Roman governor; but while on the one hand the colonies and free towns, *mancipia*, attended to their own individual administration, the subject towns and the adjacent territory were under his direction and authority.

SECTION XLII.

THE INCREASE IN THE NUMBER OF PRÆTORS.

227. The provinces were in the first instance administered by magistrates, nominated by the *comitia* specially for this service. These magistrates were styled prætors, and it was thus that in B.C. 227, in addition to the two functionaries in Rome, two new offices were created, the one for Sicily, the other for Sardinia. In B.C. 197 two were appointed to Spain, which had been divided into two sections; there were thus in all six prætors, four of whom were for the provinces. When the number of provinces increased, a new method was adopted for their administration, which was confided to the consuls or

¹ Vide supra, § 186 et seq.

prætors who had just retired from office, and who, when their functions at home had expired, went to continue them abroad in the provinces under the title of proconsuls or proprætors. As to the four prætors created originally for the provinces, they remained one year at Rome, where, having no special jurisdiction, they aided their colleagues in the administration of home justice.

SECTION XLIII.

PROCONSULS.

228. At the period of its history when Rome had but a single enemy to contend with, a single army sufficed for its purpose, and two consuls were all that it required for its command. But when in process of time war came to be maintained simultaneously in Italy, in Sicily, in Spain and Africa, it was necessary to keep several armies in the field. And so when the consular authority of the officer at the head of the legions expired, it was frequently extended by a *lex curiata*, and the same officer retained his post as a representative of the consul, *pro consul*. Thus Scipio Africanus the Second acted as general for ten years till the ruin of Carthage was accomplished. Hence originated the proconsulate. Upon the termination of war the provinces which had been recently subjugated had to be occupied and governed; and as there was always more or less fear of an insurrection, it became necessary to keep up a military force in the recently subjected territory, the government of which was entrusted to the proconsuls, who also held command of the troops quartered there. In this way the title came to have a new signification, viz., that of provincial governor.

229. The proconsul was to a great extent absolute in his government; he had no colleague, no censors, no tribunes, no prætors. The army and the administration of justice were all in his hands, and he was restricted only by the law that had been passed regulating the mode of government of the particular province. A certain number of the citizens in conjunction

with the proconsul constituted a body of *recuperatores*, which exercised judicial functions. The proconsul had under him certain delegates elected by himself, the number alone being determined by the senate. These delegates were styled *legati proconsulis* (a term which has been rendered by "lieutenants"); they represented the governor in his absence, and were preceded by a lictor and exercised whatever functions might be confided to them by the proconsul.

230. Independently of and in addition to the governor a *quæstor* was sent by Rome entrusted with the exchequer of the provinces. Taxes were not levied directly, but the most vicious of all systems was employed in their collection—that of farming—for it invariably happened that the farmers (*publicani*, publicans) burdened the tributaries, and by secret means extorted from them double the legitimate impost. This farming had up to a given time been exclusively enjoyed by the knights, and was considered as in some way attached to their peculiar order.



SECTION XLIV.

PROPRÆTORS.

231. Some provinces were consular, others prætorian. The consular provinces were those in which it was necessary to maintain a military force, and they were ordinarily entrusted to consuls retiring from office. The latter were provinces in which it was only necessary to quarter a small body of troops, and these were generally conferred upon prætors. This classification of provinces into consular and prætorian might depend upon various causes, such as the condition of the country, or its position with respect to the seat of war; and the senate would determine in which category to rank them accordingly. It followed that the character assigned to each might vary from year to year. The prætorian provinces had attached to them, like the consular, a *quæstor*, lieutenants and publicans.

232. The proconsuls and the proprætors, as a general rule, were appointed for one year only, and were required, upon resigning their post, to render an account to the senate; but we find that, almost without exception, they failed to render anything but an illusory statement, maintaining themselves by intrigue or by force in their office, attaching to themselves their lieutenants, quæstors, and publicans, in order to oppress the provinces by extortion, or to crush them by tyranny.

SECTION XLV.

THE PUBLIC CONSULTATIONS OF THE JURISTS (*Responsa Prudentum*).

233. The importance and credit which appears to have been enjoyed in the Roman republic from the earliest time by those who devoted themselves to the practical study of law, and who, by their counsels, directed the citizens in their private affairs and litigation, is one of the most remarkable features in the history of this people. The tendency of the early Romans to judicial studies and legal pursuits, their readiness to recognize the services of men who distinguished themselves in these matters, and to accord to them their suffrages when applicants for office, is apparent in every page of their history.

It was different in Greece, although that country also enjoyed a republican form of government, and its people the rights of citizenship. There, as Cicero remarks, trials were conducted in private, and the profession of the lawyer, who lent his services to the advocate, was a humble occupation remunerated by a scanty fee.¹ This characteristic of Roman manners may be traced to an instinctive love of law peculiar to this people, and to their historical origin.

In the first instance the patricians were the only class initiated into the mysteries of the law, the *actiones* and the *dies fasti*.

Seated in his atrium, surrounded by his clients and those who

¹ Cicero, *De oratore*, 1, § 45: "Non, dula adducti, ministros se præbent in ut apud Græcos infimi homines, mercede judiciis oratoribus."

had come to consult him, the aristocratic jurisconsult pronounced his dictum as a species of oracle. Those who had acquired the greatest reputation were surrounded by a proportionately large crowd.

It was not as if, in exercising these functions, the patricians gave an exposition of the civil law, or practised any profession in connection with it; it was rather, as Pomponius says, that they liked to keep the civil law as a mystery known only to themselves, and limited themselves to giving answers to those who came to consult them.¹

234. But after the publication of the Twelve Tables, after the divulging of the *dies fasti* and the secrets of the *actiones legis*, and especially after the plebeians had broken down by degrees the barriers previously existing between themselves and the patricians, the mystery attached to these things disappeared. The study and practice of the civil law, like the honours and magistracies of the republic, became open to the plebeians, and thenceforward the public profession of the jurists assumed a more liberal character; the consultation and advice to the litigants ceased to be mere opinions given in individual cases: they became a system of legal interpretation which constituted to a great extent the *lex non scripta*. Tiberius Coruncanius, the first plebeian who attained to the dignity of Pontifex Maximus, was also the first plebeian who devoted himself to the public profession of the law. Cicero says of him (*Brutus*, § 14), that the memoirs of the pontiffs attest his great capacity. He died in the year 245 B.C. Many others subsequently imitated his example. About fifty years afterwards the senate gave to Gaius Cornelius Scipio Nasica, the descendant of an illustrious family, who was appointed consul B.C. 191, a house in the Via Sacra, in order that he might be the more easily consulted.²

235. Cicero, speaking in reference to his own time, after

¹ Dig. 1, 2, *De orig. jur.*, 2, § 35, f. Pomp.: "Vel in latenti jus civile retinere cogitabant, solumque consulta-

toribus (vacare) potius quam discere volentibus se præstabant."

² Dig. 1, 2, *De orig. jur.*, § 27.

passing over the instruction which formed a less essential part of the profession, summarises in these four words the office of a jurist: *respondere, cavere, agere, scribere*.¹ *Respondere*, that is, to give advice according to the facts laid before the legal adviser upon the matters submitted to him, and frequently upon matters not in litigation, e. g., the marriage of a daughter, the purchase of an estate, or the culture of a field.² *Cavere*, that is, to indicate the forms that must be pursued, or the precautions taken, in order to secure the rights of an individual or the protection of his interests. *Agere*, that is, to interfere actively for his client in the Forum before the magistrate or before the judge, to appear with him there to support his advice with his presence, and to give such counsel as the exigency of the occasion should require. *Scribere*, that is, to compose and publish collections, commentaries or treatises upon certain parts of the law. Pomponius, in his historical precis inserted in the Digests of Justinian (lib. i. tit. 2, § 35 et seq.), traces the origin of this species of publication to Papirius, to whom he ascribes the collection of the *leges regię* (*Jus Papirianum*) about the year B.C. 531 (see above, par. No. 76); to Appius Claudius Cæcus or Centummanus, a censor in 307 B.C., who published a work entitled *De usurpationibus*, now lost; to Sextus Ælius, consul in B.C. 199, whose book, which we shall notice hereafter, was entitled *Tripertita*. He does not however mention the work prior to that of Flavius upon the *dies fasti* and the *actiones legis* (*Jus civile Flavianum*), alluded to above (par. 176), probably because Flavius was not a jurist by profession; but he gives a long list of the jurists of the period of the republic, the greater part of whom were consular personages, who left behind them works upon the law. It is interesting to observe what Cicero says, in his *De oratore* and in his Dialogue dedicated to Brutus, concerning the illustrious orators, a certain number of

¹ By uniting the two following passages, *De oratore*, 1, § 48, where Cicero defines the true jurist, "Qui legum, consuetudinis ejus, qua privati in civitate uterentur, et ad respondendum, et ad agendum, et ad cavendum, peritus esset;" and in *Pro Murena*, § 9, where he is speaking against Servius Sulpicius,

"Hic nobiscum hanc urbanam militiam respondendi, scribendi, cavendi . . . secutus est."

² Cicero, *De orator.*, iii. § 33: "Non solum ut de jure civili ad eos, verum etiam de filia collocanda, de fundo emendo, de agro colendo, de omni denique aut officio aut negotio referretur."

whom were great jurists as well as eloquent speakers. Amongst these must be mentioned Cato, to whom Cicero (*De orat.*, 1, 37) ascribes these two qualifications in a high degree—"cujus et libri exstant," says Pomponius,—and his eldest son, who has left a still greater number: "*sed plurimi filii ejus*" (*Dig.* 1, 2, *De orig. jur.*, 2, § 38). It is to this latter that the phrase in Aulus Gellius refers (xiii. 19): "*egregios de juris disciplina libros reliquit.*" We must also include the illustrious plebeian family of Mucius Scævola, the various members of which transmitted the study of jurisprudence from one to the other as an inheritance; first the Pontifex Maximus Publius Mucius Scævola, and next, of still greater fame, his son Quintus Mucius Scævola, consul at Rome in B.C. 96, and Pontifex Maximus in succession to his father. Pomponius says of him, that he was the first to establish the *Jus civile*, that is to say, jurisprudence as a science, by reducing it as a whole to eighteen books.¹ His opinions are frequently cited in the Digests of Justinian and in the fragments of later jurists. It was under him, and by taking an active part at his consultations, that Cicero was trained as a jurist.² Amyot, in his French translation of Plutarch's Lives (*Vie de Cicér.*, § 5), says that he also frequented the consultations of Mucius Scævola. Cicero did not however himself become an eminent jurist till after the death of the Augur Quintus Mucius Scævola, to whom from the time of his taking the *toga virilis* he had been confided by his father (*De amicitia*, i.), and of whom he has made mention in his works *De oratore*, *De amicitia* and *De republica*. This is not the Mucius Scævola before referred to. In this practice, and from the number of publications which it had become the fashion of the jurists of the time of the republic to produce, we may see why Cicero places amongst their functions that of *scribere*.

This acquaintance with and practical profession of the law served as a means of acquiring popularity and election to the higher magistracies. "You all know how to come and consult

¹ *Dig.* 1, 2, *De orig. jur.*, 2, § 41: "Jus civile primum constituit, generatim in libros decem et octo redigendo."

² Cicero, *Brutus*, § 89: "Ego autem,

juris civilis studio, multum opera dabam Q Scævola, Publii filio, qui, quam nemini se ad docendum dabit, tamen, consulentibus respondendo, studiosos audiendi docebat."

but you don't know how to make a consul," said a disappointed candidate to his clients, who presented themselves in his *atrium* in great numbers on the day after the election.¹ It was also reckoned as an accomplishment, and added somewhat to the dignity and respect accorded to an honourable old age.²

236. Such were, in the time of the republic, these *juris-consulti*, or simply *consulti*, *jurisperiti* or *periti*, *jurisprudentes* or *prudentes*, to whose opinions so much weight was attached, in consequence of their reputed wisdom, that they came to occupy a place as one of the sources of Roman law. The young men who were the pupils of these jurists attended them during their consultations, accompanied them to the forum, collected the replies that were given to the suitor, and thus prepared themselves for their destined career. Cicero himself pursued this course as the pupil of Scævola. The lessons thus learnt were a collection of decisions upon various points, rather than a scientific and systematic arrangement of principles, and required for their completion a study of the Twelve Tables, which were committed to memory. The *responsa prudentum* thus collected, after having served their purpose as a guide to the litigant, the magistrates or the judges, were formed into a body of principles and maxims which were continually being added to and becoming every day more accurately defined. We constantly meet with the expression *juris interpretatio*, *auctoritas prudentium*, in the works of writers from the time of the republic, and especially in the latter part of that period in the writings of Cicero. We must not read the expression *juris interpretatio* in the strict and narrow sense of a bare interpretation; for we know that, while always referring to the fundamental principles of Roman law, such as the Twelve Tables, the jurists gradually developed a progressive system, sometimes laying the foundation, at others

¹ Valerius Maximus, ix. 3, 2: "Omnes consulere scitis, consulem facere nescitis!" Ascribed to C. Figulus, a jurist of reputation about the year 133 B.C.

² Cicero, *De oratore*, i, § 45: "Senectuti vero celebrandæ et ornandæ quod honestius potest esse perfugium, quam *juris interpretatio*."

adding the superstructure. Nor must we take the term *auctoritas* in an absolute sense. The decisions of the jurists were not till long after this period obligatory, nor were the judges bound to observe them, as for instance in the case of Scævola himself, whose opinion could be rejected by the judge, as we learn in Cicero, *Pro Cæcina*, § 24, if the opposite party was in a position to show that it was not good law. (*Sed ut hoc doceret, illud quod Scævola defendebat non esse juris.*) This *auctoritas* was that general authority which resulted from the force of reason, and from the application of sound practical common sense to the circumstances of the case, the conclusion being grounded, at least in appearance, on the accepted basis of the law—the Twelve Tables and other legislative enactments.

It is in this sense that the *juris interpretatio* or the *responsa prudentum*, which were styled, speaking strictly, *jurisprudentia*, that is to say, the logical deduction and correct application of the law, formed a part of the Roman *lex non scripta*, or unwritten law (*quod sine scripto venit*); which did not receive, says Pomponius, as other branches, a special denomination, but which bore the common appellation of *jus civile*,¹ that is to say, the civil law generically, including text and commentary. Modern German historians and commentators upon the Roman law, speaking still more laconically, have styled it simply *jus*.

237. Already, towards the close of the republic, men of superior understanding saw and felt the necessity of collecting, arranging, pruning and restoring to a more simple and harmonious whole, the large, and not unfrequently conflicting, mass of matter which had been accumulated by direct legislation and the labours of the jurists. Cicero had himself commenced the compilation of a work upon the civil law, entitled *De jure civili in artem redigendo*,² and amongst the projects conceived by

¹ Dig. 1, 2, *De orig. jur.*, 2, § 5, f. Pomp.: "Hæc disputatio, et hoc jus, quod sine scripto venit, compositum a prudentibus, propria parte aliqua non appellatur, ut cæteræ partes juris suis nominibus designantur, datis propriis nominibus cæteris partibus: sed communi nomine, appellatur *jus civile*."

² Aul. Gell. 1, 22: "M. autem Cicero in libro qui inscriptus est *De jure civili in artem redigendo* verba hæc posuit: 'Nec vero scientia juris majoribus sibi Q. Ælius Tubero defuit; doctrina etiam superfuit.'" Quintilian, xii. 3: "M. Tullius, non modo inter agendum nunquam est destitutus scientia juris, sed

Julius Cæsar was that of reducing the civil law to circumscribed limits, by eliminating from the immense and diffuse bulk of law the portions that were of the smallest value.¹ Those parts which appertained to the manners and customs of the republic would unquestionably have disappeared.

In proportion as the science of the civil law and the profession of the jurist became popular, the relationship resulting from the ancient system of clientage became enfeebled. The growth of the plebeian body and the accession of its new members, who had never been subjected to the patrician, together with the political emancipation of the entire plebeian body, rendered the connection useless; and thus the ancient clientage, that political legal subjection so characteristic of Rome, disappeared day by day, giving place to an entirely new clientage,—a clientage rather of fact than of right, the influence of knowledge and reputation rather than that of race.

238. We must take care not to confound the expressions *publice respondere* and *publice profiteri* with any notion of advising or instructing at the public expense. Such an idea is rebutted by the manners of the period and by the language of Pomponius, who evidently applies the word *publice*, not to any salary but to the publicity with which the responses were given and the teaching conveyed, to distinguish it from the secrecy or mystery with which the earlier jurists had enveloped themselves. He tells us, in addition, that the right of thus publicly giving legal advice was not a right that had to be obtained from any source whatever, but that whoever felt himself competent was at liberty to give his opinion publicly upon any point of law.²

etiam componere aliqua de eo ceperat : ut appareat, posse oratorem non dicendo tantum juri vacare, sed etiam docendo."

¹ Suet., *J. Cæsar*, § 44 : "Jus civile ad certum modum redigere : atque ex immensa diffusaque legum copia, optima quæque et necessaria in paucissimos conferre libros."

² "Ante tempore Augusti publice respondendi jus non a principibus dabatur; sed qui fiduciam studiorum suorum

habebant, consulentibus respondebant." Dig. 1, 2, *De orig. jur.*, 2, § 47, f. Pomp.

Pomponius, in the historical summary which he has left us, after setting forth the origin and the progress of the laws, and other sources of Roman law (*juris originem atque processum*, § 1 et seq.), then the various magistracies (*quod ad magistratus attinet*, § 14 et seq.), passes to the biography of the principal jurists (§ 35 et seq.).

SECTION XLVI.

A NEW WORK ON THE ACTIONES LEGIS (*Jus Ælianum vel Tripartita*).

239. Amongst the jurists of these times we must distinguish Sextus Ælius (curule ædile in B.C. 201, consul in B.C. 199 and subsequently censor), who, as Pomponius tells us in alluding to the words of the ancient poet Ennius, was mentioned by him, *Sextum Ælium etiam Ennius laudavit*, in the following flattering terms:—

Egregie cordatus homo Catus Ælius Sextus.
Catus Ælius Sextus, a man of noble heart.

Sextus Ælius composed a work known as the *Tripartita*, because it consisted of three parts: first, the law of the Twelve Tables; secondly, their interpretation; and thirdly, the *actiones legis*.¹

According to one account, which is however without confirmation, the pontiffs and patrician jurists, after the formulæ of the *actiones legis* had been divulged by Flavius, invented new ones, which they took the precaution to write in symbols or initial abbreviations (*per siglas expressæ*).² If this were so, the book of Sextus Ælius would be a revelation of this new secret. Pomponius, however, says nothing of all this; he simply mentions the fact of the publication of the *Tripartita*, and says that the *actiones legis* are treated of in the third part. Add to this the fact that Sextus Ælius himself composed certain new formulæ for those cases which were wanting. It indeed appears most unlikely that, after the admission of the plebeians to the various magistracies, to the pontificate itself, and to the study of the civil law, and especially after the commencement of the practice of publicly teaching law, which, as we have seen, began with Tiberius Coruncanius, himself a plebeian, and was steadily

¹ Dig. 1, 2, *De orig. jur.*, 2, § 38, f. Pompon.

² This rests upon the passage in Cicero, which, in speaking of the patricians after the publication of the *dies fasti* and the actions by Flavius, says: "Itaque orati illi, quod sunt veriti, ne

dierum, ratione pervulgata et cognita, sine sua opera lege posset agi, *notas* quasdam composuerunt, ut omnibus in rebus ipsi interessent." Cicero, *Pro Muren.*, § 11. See also Festus, on the word *Nota*.

continued—it is most improbable that the formulæ of the *actiones legis*, even supposing that they had been renewed, would be made, or could remain, a mystery. This work of Sextus Ælius also received the title of *jus Ælianum*.¹

SECTION XLVII.

THE GRADUAL DECLINE OF THE ACTIONES LEGIS—THE CREATION OF A FIFTH ACTION (THE *Condictio*, *Lex Silia*, AND *Lex Calpurnia*)—THE PARTIAL SUPPRESSION OF THESE ACTIONS (*Lex Æbutia*).

240. The *actiones legis* exhibit in the highest degree the characteristics of judicial proceedings peculiar to the earliest stages of civilization. They were ceremonies expressing ideas by means of external representations or pantomimes, symbolizing the objects and incidents of a still earlier and more barbarous age. They were rigid forms long regarded as mysteries, all the minutiae of which were invested with a sacred character. Such institutions must necessarily experience the vicissitudes incident to the progress and growth of civilization. Their sacerdotal, patrician, symbolic and sacramental character became in the course of time more and more at variance with the manners and social condition of the times; and above all these characteristics were to the Roman plebeians a vestige and unwelcome reminiscence of a past servitude.

Everything, therefore, tended to bring the *actiones legis* into discredit, and we shall find that the decline of this institution kept pace with the progress of history.

241. Flavius by divulging these formulæ, Coruncanus and every plebeian after him by publicly teaching the law, Sextus Ælius by giving to the people his work concluding with the *actiones legis*, had effectually stripped them of their mysteries and sacerdotal characteristics.

¹ "Quia deerant quædam genera agendi . . . Sextus Ælius alias actiones composuit, et librum populo

dedit qui appellatur *jus Ælianum*." Dig. 1, 2, *De orig. jur.*, 2, § 7, f. Pomp.

242. The *actio sacramenti*, the most ancient of the *actiones legis*, was applicable to all cases, and was without doubt the most rude as well as rigorous in its symbols and material characteristics, in its sacramental words, and, finally, in the preliminary deposit which it required to be made to the pontiff. Already, and even before the Twelve Tables, the *judicis postulatio*, the second of the actions, had introduced a simplification of procedure, viz., the suppression of the *sacramentum*, or pecuniary deposit, and was used in cases where the necessity of less formality had become manifest. We recognize the same character in the fifth of the *actiones legis*, the *condictio*, introduced by the *lex Silia*, in the first instance exclusively confined to disputes respecting specific sums of money (*certain pecuniæ*), and extended by the *lex Calpurnia* to every species of obligation, provided that it was definite in its character (*de omni certa re*).¹ The precise date of these laws is not known, but they are by conjecture assigned to the years B.C. 244 and 234, and this brings their origin down to the period when the *actiones legis* became almost extinct. We know but little of the details of the forms of the *condictio* beyond the fact that it was so called because the plaintiff announced (*denuntiabat, condicebat*) to his adversary that he would have to appear before the magistrate, in order that a *judex* might be appointed.² This is sufficient to show that the symbolic and material acts of the *sacramentum* were dispensed with; that more simple ideas and practices prevailed; that in one word their introduction was a partial abrogation of the ancient *actio sacramenti* and mysteries, first in the case of a dispute concerning a liquidated amount, and afterwards concerning that of any ascertained subject.³

243. In fact, not far from this period, toward the end of the sixth century, the general antipathy and the discredit attached to the system of the *actiones legis* resulted in their suppression,

¹ Gai., *Instit.*, 4, § 19.

² "Et hæc quidem actio proprie condictio vocabatur: nam actor adversario denuntiabat, ut ad judicem capiendum die XXX. adesset." Ibid.

³ It is to these facts and dates that

we refer the explanation of the creation of the *condictio*, the motive for which was discussed, as Gaius tells us, even in his time. The *lex Silia* and the *lex Calpurnia* were the precursors of the *lex Æbutia*.

if not absolutely, at least practically, that which remained being in fact rather regarded as an exception to the new system of procedure then introduced than a part of it.

This event is alluded to in a passage of Aulus Gellius, which has long been in our possession, but was unintelligible till the discovery of the manuscript of Gaius:—"Sed istæ omnes legis actiones paulatim in odium venerunt, namque ex nimia subtilitate veterum, qui tunc jura condiderunt, eo res perducta est ut vel qui minimum errasset, litem perderet. Itaque per legem *Æbutiam* et duas *Julias* sublatae sunt istæ legis actiones, effectumque est ut per concepta verba, id est per formulas, litigaremus."¹

244. The extent of the provisions of the *lex Æbutia* as to the suppression of the *actiones legis* is not accurately known, because it is to this law, concurrently with the two *leges Juliae*, that Gaius attributes the suppression, without telling us the part performed by each. If we rely upon the words of Aulus Gellius just cited, we might be induced to believe that the abrogation, especially as to the *actiones legis* relating to ordinary trials, was the work of the *lex Æbutia*, and that the two *leges Juliae*, enacted at a subsequent period, fixed and regulated several important points concerning the new procedure and confirmed and completed the *lex Æbutia*. Be this as it may, the procedure by the *actiones legis* was preserved in two classes of cases, of which mention should first be made of those cases which were of necessity heard by the centumviri.² This tribunal, which was eminently Quiritarian and derived from the tribes, confined itself to the Quiritarian action of the *sacramentum*.

245. The date of the *lex Æbutia* is as uncertain as is the

¹ Gai., *Instit.*, 4, § 30. Aul. Gell., *Noct. attio.*, 16, § 10: "Sed enim quum proletarii, et assidui, et sanates, et vades, et subvades, et viginti quinque asses, et taliones, furtorumque quæstio cum lance et licio evanuerint, omnisque illa XII Tabularum antiquitas, nisi in legis actionibus centumviralium causarum, lege *Æbutia* lata, consopita sit."

² Gai., *Instit.*, 4, § 31. The second was the case of injunction in the event of threatened damage from an adjoining building (*propter damnum infectum*); but the *actio legis* in this instance was only facultative and soon fell into disuse, the edict of the prætor having furnished a far more convenient and preferable remedy.

extent of its provisions. It is mentioned neither by Gaius nor Aulus Gellius; but by an examination of the records of Roman history, and searching for the year in which there were tribunes of the name of Æbutius, we are brought down to a period between B.C. 234 and 171. The earliest of these dates is that usually fixed upon, B.C. 234; but this appears to me the least admissible. Looking at the connection of the dates alone—first, at the *lex Silia*, which created the *condictio*, probably in B.C. 244; secondly, at the *lex Calpurnia*, which extended the *condictio*, probably in B.C. 234; thirdly, at the *jus Ælianum* of Sextus Ælius, which published the *actiones legis* and at the same time made certain additions to them in B.C. 202; fourthly and finally, at the *lex Furia testamentaria*, which, according to Gaius, made a new application of the *manus injectio* to a case which had recently arisen, in (probably) B.C. 183¹—looking at these facts we shall be justified in rejecting the year B.C. 234 as that in which the *lex Æbutia* was promulgated, and giving the preference to the year B.C. 177 or 171.²

246. The same uncertainty exists with regard to the two *leges Juliae*, one of which is usually recognized as the law of Augustus, concerning procedure in private matters, *lex Julia judicaria privatorum*, and is ascribed approximately to B.C. 25;

¹ Gai., *Instit.*, 4, § 23. It is true that it might be objected to this last observation, first, that it is not astonishing that the *lex Furia testamentaria*, in the case of disputed legacies, caused a new application of the *actio manus injectio* at a period when the *actiones legis* had been suppressed, because they were already preserved in those causes which necessarily came before the *centumviri*, amongst which were all testamentary disputes; secondly, that, although a conjecture, it is supported by various passages from Cicero, that the *actiones legis*, which were only forms of execution, that is to say, the *manus injectio* in the greater number of instances, and the *pignoris capio* in all, had not been abrogated by the *lex Æbutia*. But if we pay attention to this passage in Gaius, it will not be difficult to see that he speaks of the *lex Æbutia* as being posterior to the

lex Furia.

² There is doubtless great uncertainty concerning all these dates, but it appears to me singular that the chronological tables which place the creation of the *centumviri* in the year B.C. 242, the *lex Silia* in the year B.C. 244, the *lex Calpurnia* in the year B.C. 234, and the *jus Ælianum* in the year B.C. 202, are precisely those which adopt the year B.C. 234 as the date of the *lex Æbutia*, so that the creation of the *centumviri* would only have preceded the suppression of the *actiones legis* by a period of eight years; the fifth action of the law, the *condictio*, would only have been created ten years before its suppression, and extended to *omni certa res* precisely at the moment of its suppression; and, finally, the publication of the *actiones legis* by Sextus Ælius would have taken place, according to this, after those actions had been abolished.

the other may be either the law of Augustus concerning procedure in criminal matters, *lex Julia judiciaria publicorum*, or a judiciary law of Julius Cæsar, *lex Julia (Cæsaris) judiciaria*, probably of B.C. 46. These laws are therefore dated a century later than the *lex Æbutia*, and do not belong to the period to which our attention is at present directed.



SECTION XLVIII.

THE ORDINARY OR FORMULARY PROCEDURE (*Ordinaria Judicia*, vel *per Formulas*).

THE EXTRAORDINARY PROCEDURE (*Extraordinaria Judicia*).

247. The system of the *actiones legis* was replaced by that of the *formula*, or, as it was called, the ordinary system, which is the second phase of Roman legal procedure. This system, remarkable for the ingenuity with which it was devised, was the result of a gradual process of development, and did not make its appearance in the first instance in the complete or perfect form which it ultimately attained. It is well worthy of the consideration even of modern publicists, for it was the result of the development of prætorian law and philosophic jurisprudence; it marked the passage of law as an instrument of patrician power into a system of judicial administration; it was the legal genius of Rome undergoing the process of transformation—the growth of the plebeian and Quiritarian elements into the plebeian and humanitarian. Under it the plebeian was enfranchised and the foreigner entitled to participate in Roman justice—in fact, it worked an entire revolution.

248. The student must be careful not to confound the formulas to which we are now alluding with those in use in the *actiones legis*. The material representations, gestures, symbols and mystic words of the old *actiones* had disappeared. The dominant idea of the new system is, that, after the magistrate had heard the statement of the parties briefly made before him

in jure, he organized the suit by delivering to the judge written instructions, or a formula, by which the judge was appointed; the points to be decided between the litigants were defined, and the extent of his power determined.

249. The study of the constituent parts of the *formula* furnishes the key to the whole system. It invariably commences with the appointment of the judge, *Judex esto*. In addition to which, there are usually three or four other clauses (*partes*).

1st. The *demonstratio*, or statement of the fact or facts alleged by the plaintiff as the ground of his case: "*Quod Aulus Agerius Numerio Negidio hominem vendidit.*" This element did not necessarily form a part of the *formula*, inasmuch as this preliminary statement might be sufficiently set forth in the second part.

2nd. The *intentio* (from *in* and *tendere*), which was the statement in precise terms of the claim made by the plaintiff, which was to be determined by the judge, and which, consequently, involved the question of legal right, *juris contentio*, according to the expression of Gaius: "*Si paret . . . &c.*" if it appears that, . . . &c." This is the vital element of the *formula* and could in no instance be wanting when the question was the existence or non-existence of a civil right.

3rd. The *condemnatio*, which was the authority or order given to the judge to condemn or to acquit according as the facts were proved or not, and which determined the latitude of his authority: "*. . . . condemnato; si non paret absolvito.*" Every *condemnatio* was pecuniary. The judge, whatever might be the nature of the action, was only empowered to condemn in a pecuniary penalty. This is therefore a characteristic feature of the *formula* system. The expedients resorted to in order to avert the inconveniences which attached to this peculiarity in many instances were ingenious, and are worthy of consideration.

4th. The *adjudicatio*. This was the power of partition conferred by the magistrate upon the judge, in addition to that of merely finding for or against the plaintiff. And it authorized him to make such division or distribution of the property in

question as the circumstances of the case required, "*quantum adjudicare oportet, judex Titio adjudicato.*"¹ This section of the *formula* was confined to three classes of action: viz., *familiæ erciscundæ*, or suits brought for the partition of an *hæreditas*; *communi dividundo*, for the division of a thing held jointly; and *finium regundorum*, for the fixing and settling the boundaries of contiguous landowners.

250. In this system of procedure the signification of the word *actio* is fundamentally altered. It here designates the authority conferred in each individual case by the magistrate upon the judge to try and determine its merits.

The words *actio*, *formula*, *judicium*, are often used as synonymous.

251. In fact this system is nothing but an ingenious method of constituting and directing a jury in civil matters. We must start from the principle that the judge was not the magistrate, but simply a citizen; that he had not consequently any functions save those conferred by the magistrate, and beyond the terms of the *formula* itself he was powerless. The main point, therefore, in this form of procedure was the construction of the *formula*, and hence it was that so much skill and labour were bestowed upon its development. To this end the most celebrated jurists were consulted both by the magistrate and the litigant. The conciseness and accuracy of the terms employed are admirable. But these terms, it must be remembered, were no longer, like those of the *actiones legis*, symbolic; nor was the misuse of them followed by the penalty which attached to that of the terms of the *actiones legis*, the loss of the suit, but they enjoyed a flexibility which permitted their adaptation to the peculiar circumstances of any given case.

Each case, however slightly it might differ from another, was provided for, because each required its appropriate *formula*. The *formulas* themselves forming to a certain extent the models or general types were prepared beforehand, incorporated into the general body of jurisprudence, inscribed upon the *album*

¹ Gai., *Instit.*, 4, §§ 39 et seq.

and exposed to the public.¹ The plaintiff, when before the magistrate (*in jure*), specified what he required. The limits of the specific terms were discussed between the parties, the formula was adapted to the actual case in question, and finally delivered by the prætor (*postulatio, impetratio, formulæ, vel actionis, vel judicii*).² Afterwards the judge, whose duty it was to determine the fact or law in dispute according to the nature of the case, heard the respective parties, received what evidence was presented, resolved the problem submitted to him, and delivered his judgment (*sententia*), always taking care to confine himself within the limit of the power conferred upon him by the formula.

252. We may well ask how a system so remarkable in its character, and which was substituted by the *lex Æbutia* for that of the *actiones legis*, was originated? Was it an instantaneous production, or was it the result of some gradual development? It is a question of doubt whether, even under the system of the *actiones legis*, something of a similar character did not exist, that is to say, whether the magistrate, after the symbolic rite of the *actiones legis* had been performed before him, in submitting the parties to the decision of the judge did not give to that judge some sort of form or formula, specifying what he was to find and the extent of the powers conferred. If so, the innovation made by the *lex Æbutia* was comparatively slight and simple, and in fact was rather confined to the suppression of the ritual of the *actiones legis* as then practised than to the creation of a new form. The residue of the procedure in that case alone remained, and as all but the formula was gone it would naturally become the procedure of the formula. We, however, join in the opinion of those who decline to ascribe to it this origin, and who reject the notion that in the *actiones legis* any species of formula was given to the judge.

253. However, the new system at the period when the *lex*

¹ Gai., *Instit.*, § 47. Cicero, *Pro Cæcin.*, 3; *De invent.*, 19; *In Verr.*, 4, 66.

² Cicero, *Part. orat.*, § 28; *Pro*

Æbutia sanctioned it, was not a novelty. In our opinion it had constituted the mode of administering justice between *peregrini*, or between citizens and *peregrini*; and tracing it to this source we ascribe to the *prætor peregrinus* the credit of having developed and elaborated it into a system.

254. In fact from the moment that it was admitted that the *peregrini* could have, whether as between themselves or as between themselves and citizens, legal redress for their wrongs, the consideration of which might be referred to a Roman magistrate, it became a matter of necessity to proceed in a manner entirely different to that peculiar to the *actiones legis*. These actions could not be brought into operation, inasmuch as their application was confined to Roman citizens; nor could the civil law be made to apply, whether it was a question of property or of obligation, inasmuch as the *peregrini* were strangers to it; nor was the ordinary citizen judge the proper tribunal, inasmuch as he was taken from the senatorial class, and much less were the *centumviri* suitable. The proper persons to adjudicate, the proper procedure to be used, and the proper law to govern the case, had each to be settled or created, or, at least, regulated by the sole power (*imperium*) and jurisdiction of the magistrate.

The practice therefore had prevailed, as long as the necessity had existed, for the Roman magistrate, by virtue of his *imperium* and *jurisdictio*, to regulate the conduct of the suit, sending as he did the litigants before the *recuperatores*, who were, as custom and the principles of the *jus gentium* had determined, the proper arbitrators in matters where the interests of *peregrini* were involved.

When the influence of the foreigner at Rome had given rise to the creation of the *prætor peregrinus* as a distinct magistracy, he adopted and continued this practice, daily improving the formula, and imparting to it precision and accuracy by his annual edict.

The order which conferred power upon the *recuperatores*, and which was to serve them as a guide in the discharge of their duty, was either from the commencement written, or as the result

of subsequent improvements was reduced to a written form. This became their instructions, at the same time indicating the point which it was their business to determine, and telling them the judgment that they were to pronounce according to their finding. This was the *formula*.

255. The citizens, especially in the earlier part of the sixth century, daily saw this system pursued amongst the *peregrini* and in those matters in which they were jointly interested with the *peregrini*; and having experienced the advantages of its simplicity and observed the flexibility of its character, which enabled it with ease to be adapted to the progressive wants of a growing civilization, abandoning the formality of the *actiones legis*, they commenced, without any enacting law and by the sole influence of custom, to have recourse to the same system and to demand *formulas* from the prætor in cases amongst themselves, as Roman citizens. These applications were received with favour amongst other reasons for this, that with the Romans the various magistrates invested with specific functions could at will supply each other's office, for instance, the *prætor peregrinus* might act for the *prætor urbanus*, and *vice versâ*.

256. The formula first designed for the sole benefit of the *peregrini* had originally but two parts, the *demonstratio* and the *condemnatio*; but as soon as it was to be applied to disputes between citizens and to questions of civil law, it required amplification. It was at this time that the four distinct parts of which the full *formula* is composed took their origin. The prætors then endeavoured, as far as possible, to approximate the procedure of the *actiones legis*, so that the transfer from one system to the other might easily be made. It is curious to observe the traces of this imitation, exhibiting the successive steps by which the new procedure came ultimately to entirely supplant the old.¹

257. The formula in some of its parts appeared a simplification of the most important features of the *actiones legis*. The

¹ See *Explication historique des Instituts*, vol. iii. title "*Des actions*."

administratio, which indicated the object of the suit, replaced the pantomimic gestures of the old system; and it is to be observed that the *intentio*, which was the statement of the claim of the plaintiff, was clearly founded upon the very words uttered by the plaintiff in the *actiones legis*. “*Hunc ego hominem ex jure quiritium meum esse aio*,” were, for example, the words used by the plaintiff in the *sacramentum*, in asserting his claim to some material object, at the same time that he placed his lance, the *vindicta*, upon the object (in this case the man) that he claimed as his.¹ “*Si paret hominem ex jure quiritium Auli Agerii esse*,” were the words used by the prætor in the *formula* of the real action.² The same ideas were materialized in the *actiones legis*, and, if we may so express it, spiritualized by the prætor in the *formula*.

258. If we wish to ascertain the effect produced by the *lex Æbutia*, we must take into consideration the condition in which the procedure was at the time of its publication.

Amongst the *actiones legis* the *sacramentum* was solely confined to state questions and real rights, and to certain other special matters, that is to say, to questions which must come before the *centumviri*.

The *actiones legis, per judicis postulationem et per condictionem*, were those applicable to the case of disputed obligations; but as a matter of fact, in questions of this kind, the citizens imitated the practice pursued in similar cases in which the interests of *peregrini* were involved and applied to the prætor for a *formula*. It was, to a certain extent, therefore, merely the legalization of this practice that was introduced by the *lex Æbutia*. It did not, in fact, invent or introduce a new system, but gave the sanction of the legislature to that which custom had already adopted.

259. The *judicis postulatio* and the *condictio*, relative to obligations, were however suppressed and replaced by the *formula*.

As to the *sacramentum*, it still survived. State questions,

¹ Gai., *Instit.*, 4, § 16.

² Gai., *Instit.*, 4, §§ 41, 93.

disputes concerning Quiritarian property, or real rights, as also those concerning successions, continued to be litigated by the procedure of the *actiones legis*, and were heard by the *centumviri*. This college was still too powerful and popular an institution to be suppressed. And it required the lapse of time and the gradual operation of prætorian influence to introduce the application of the *formula* system to the matters submitted to its jurisdiction.

260. The legalization of the procedure by *formula* did not produce any immediate or considerable modification in the magisterial and judicial authority. However there are two changes which can with justice be ascribed, if not wholly at least to a considerable extent, to this system. These were, in the first place, the application to disputes between citizens, not as a universal rule, but in certain cases, of the employment of *recuperatores*, who had hitherto been exclusively confined to the cases of *peregrini*: and, on the other hand, the employment of the *unus judex*, or *arbiter*, who had hitherto been exclusively confined to disputes between Roman citizens, to those between *peregrini*, or between Roman and *peregrinus*. This was therefore, to a certain extent, a reciprocal exchange of privileges, and mainly resulted from the tendency of the prætor to level the distinction between the two classes. In the second place, the gradual decline of the college of the *centumviri*, which had retained the procedure of the *sacramentum*, but which also, by degrees, abandoned it in practice as the advantages of the *formula* system became apparent, and ultimately confined it to disputes concerning the validity of testamentary wills.

261. At the period to which our attention is now directed the privilege of furnishing the *unus judex*, or *arbiter*, was still confined, at Rome, to the senatorial order. In the provinces the judges, notwithstanding the fact that they were inscribed on the lists of the decuries, prepared by the governors in imitation of the Roman practice, were called *recuperatores*; and we must take care not to confound these with the *recuperatores* employed at Rome in certain cases.

262. Sometimes the magistrate, instead of sending the case to the judge, heard it himself. There were, indeed, certain suits which, from their nature, were always determined in this way. This mode of procedure was termed *extra ordinem cognoscere*; *extra ordinem cognitio*; whence was derived, at a later date, the title of *extraordinaria judicia*, to distinguish this form of procedure from the ordinary mode under the *formula* system, known as the *ordinaria judicia*.

SECTION XLIX.

THE INTRODUCTION OF PHILOSOPHY AND ESPECIALLY OF STOICISM—ITS INFLUENCE UPON JURISPRUDENCE.

263. While the Roman jurists were carrying on their public consultations a new class of rhetoricians and philosophers made its appearance. According to Suetonius, it was during the interval between the second and third Punic war that a Grecian deputy, who had broken his arm, employed the period of convalescence by lecturing on philosophy, to an audience he collected for the purpose of listening to him. Similar schools were soon opened by others.¹ At a later period, B.C. 150, three Athenian deputies, Diogenes, Critolaus and Carneades, by their great eloquence attracted the attention of the Romans. It is said that Carneades on one occasion maintained the existence of justice as a fact, and on the following day undertook to prove that it was nothing but a word; and that this conduct so affected

¹ These rhetoricians and their schools were disapproved of both by the senate and the censors. Suetonius furnishes us with two measures which may perhaps be of interest: "Under the consulate of — the case of the philosophers and the rhetoricians having been discussed, the senate decreed that M. Pomponius should take steps to protect the interests of the republic and not suffer these men to remain in the city." The second is a declaration made by the censors: "E. Domitius Ænobarbus and Licinius Crassus, censors, have declared as follows: 'We have been informed

that certain men, under the name of Latin rhetoricians, have established new schools; that the youth are crowding after them, and passing entire days in their company. Our ancestors have decreed that which our children should learn and the schools they should attend. We disapprove of these innovations upon our ancient customs, considering them mischievous; and we thus make known our decision both to those who keep and to those who frequent these schools. They displease us.'" Suet., *De clar. rhetor.*, § 1.

Cato that he demanded that such ambassadors should be immediately dismissed. The principles of the Stoics were developed side by side with those of the Epicureans. Stoicism appeared to be especially adapted to the Roman genius, and it accordingly took root and rapidly acquired a strong and permanent hold upon the Roman mind, especially among men of superior intelligence, whereas the Epicurean system was embraced by men of a different class. Stoicism ultimately made a profound impression upon Roman jurisprudence, and introduced the principle of law based upon reason and justice rather than on power. It contributed largely to the decline of Quiritarian law and to the erection of a scientific and philosophic system which was ingeniously substituted for the former. Its influence upon jurisprudence extended both to principle and to practice.

264. We have now arrived at a period in our history where the student may observe a rapid decline in ancient Roman morals; where the institutions of the republic have given way, the suffrages of the *comitia* are purchasable, justice sold, the censorship abolished or degraded, the dictatorship made perpetual, and the provinces pillaged. We find enormous wealth in the hands of a single citizen, profligate luxury, armies the property rather of their general than of Rome, the reckless sacrifice of Roman blood, and the natural termination of the whole—Absolutism.

SECTION L.

THE SEDITIONS OF THE GRACCHI (*Gracchanæ*). AGRARIAN LAWS (*Leges agrariæ*).

265. B.C. 133. The two Gracchi were deadly enemies to the senatorial aristocracy of race and fortune which at this time oppressed the plebeian no longer, it is true, by the ancient privileges of caste, but by the influence which results from wealth. Tutored in the doctrines of the Stoics, democratic tribunes who aimed at improving the condition of the *proletarii*, they took to agitating and fomenting the passions of the

plebeians, and the latter, worked upon by their marvellous eloquence, and impressed with the nature of their schemes, facilitated their election to office, and assisted in the promulgation of their laws by sedition and by the sword. These instruments were equally resorted to by their opponents. Both ultimately perished, and the attempted reforms, notwithstanding that they were founded on principles of justice and expediency, and were calculated not only to benefit the poorer classes, but to contribute to the future well-being of the republic, were handed down to posterity as "seditions."

266. The conquered lands, which had been reserved as public property under the title of *ager publicus* (see par. 92), had considerably increased, owing to the extended operations of the Roman arms. A portion of these lands, according to custom, was held as forest or common pasture land, or let out to be farmed for the benefit of the treasury. The residue was divided by the censors in the name of the republic, to be held and cultivated for a certain rent, sometimes a tithe, or even less, and at others on a simple fine. These lands, instead of being distributed in small lots among the poorer members of the plebeians, so as to provide them and their families with a rural habitation, and to attach them to agricultural pursuits, had accumulated in the hands of the patricians, the senatorial families, and the wealthy and powerful plebeians.

From the time of Servius Tullius, as we find from the historians, distribution had been made of lands after various conquests; but if, in this early period, the lower orders received, under any title whatsoever, any portion of the lands so distributed, it is clear that the lion's share fell to the wealthy, and this in proportion as it became a question of more extended conquest or of larger territory.

Those to whom these lands were conceded did not enjoy proprietary rights in them, inasmuch as these were lodged in the state; but, under the title of *possessionses*, they had the privilege of disposing of them as of a patrimony: they transmitted them as an inheritance, freeing them in the course of time from every kind of taxation or rent due to the treasury,

and settling upon them, for the purpose of their cultivation, the servile classes and slaves acquired in war, who owed no service to the republic; so that, in fact, the result of this system was that the poorer plebeian was not merely excluded from the possession of these lands, but even from their cultivation. The long enjoyment of these privileges, the sales and various changes which the lands underwent, became so many titles in favour of the pretensions of those to whom they had ultimately passed; and, as a result, every effort to alter this state of things was regarded by the possessors as an attempt at spoliation.

267. Such were the agrarian laws, which were and still are misconceived when represented as applicable to private property. More than once during the course of the republic, attempts were made and laws were proposed to remedy the existing evil, to limit the abuses connected with these possessions, and to restore them to the state, in order that they might be distributed among the poorer citizens; these attempts were attended by insurrections of the plebeians. The *proletarii* revolted, and great clamour was raised for participation in that which they, with reason, called the usurped property of the republic.

268. Already by the *lex Licinia, De modo agrorum*, one of the three laws proposed, advocated with indomitable perseverance and ultimately carried by the tribunes C. Licinius Stolo and L. Sextius in the year B.C. 367, there was a prohibition under a penalty of 10,000 asses against any one possessing more than 500 *jugera* of land (*ne quis amplius quam quingenta agri jugera possideret*).¹ Was this, it may be asked, an agrarian law, that is to say, a law exclusively relating to the possession of *ager publicus*, or was it a provision concerning the territorial rights of private individuals (*dominium*), to which it affixed a maximum not in any case to be surpassed? This latter opinion prevailed with our ancient classical commentators. Niebuhr has, on the contrary, upon his own authority, held that the *lex Licinia* was an agrarian law, and this opinion for a time

¹ Valer. Max. viii. 6, § 3.

obtained favour, but, like its predecessor, has in its turn been abandoned and confuted with arguments which are certainly not without weight. In effect, of the three laws passed by the tribune *Licinius*, one enacted that one of the consuls should be elected from among the plebeians, while the other two related to the embarrassed condition of the poor citizens, oppressed by debt and by the want of landed property; whether they had never possessed any, which was the condition of the greater portion, or whether they had been reduced to the necessity of denuding themselves of it in payment of their debts. As to the first—those embarrassed by debt—the *lex Licinia, De ære alieno*, ordered that money already paid under the head of interest should be taken in reduction of the capital, and that the surplus should be paid by equal instalments within three years. As to the second—those who were destitute of land—the *lex Licinia, De modo agrorum*, appears to have provided that the rich should sell whatever land they possessed in excess of the 500 *jugera*, and, as the price obtainable at a forced sale would naturally be lowered, land would become more accessible to the plebeian.¹ Such is the sense in which the *lex Licinia*, when held to apply to private property, ought to be understood, not as a spoliation of the landed proprietors, but as placing a legal limit upon the ownership of realty, with the obligation of alienation consequently attaching to all that they held in excess of the prescribed limit. This law was, however, ill observed, and its prohibitions disregarded from its very enactment. And, according to the historians, the very person who had been its promoter and who had given to it his own name, *Licinius Stolo*, acquired either by purchase or otherwise a thousand *jugera* of land; he then emancipated his son, in order to make him the head of a family and consequently empowered to hold property, and transferred to him 500 of these *jugera*. Upon the accusation of M. Popilius Lenas he was condemned to

¹ Livy, vi. § 35: "Creatique tribuni C. Licinius et L. Sextius promulgavere leges omnes adversus opes patriciorum et pro commodis plebis; unam *De ære alieno*, ut, deducto eo de capite, quod usuris pernumeratum esset, id, quod

superasset, triennio æquis portionibus persolveretur: alteram, *De modo agrorum*, ne quis plus quingenta jugera agri possideret: tertiam, ne tribunorum militum comitia fierent, consulunque utique alter ex plebe crearetur."

a fine of 10,000 asses for having fraudulently violated his own law.¹ There are also several other instances recorded at different intervals of condemnation on this ground, but in the course of time the zeal for bringing accusations against those who exceeded the limits abated, and as a result the *lex Licinia* became obsolete.

269. If absence of detail and obscurity of expression impart to this first law a degree of uncertainty,² the same at least cannot be said concerning the agrarian laws of the period of the Gracchi. These are unquestionably laws concerning the distribution of *ager publicus*. The ancient monopolies were yet in existence, and the conquest of all Italy, and afterwards of the provinces, had opened up a new and vast territory. The evil was at its height when the first of the Gracchi, Tiberius Sempronius Gracchus, elevated to the tribunate, advanced his project for the distribution of the *ager publicus*. His propositions were conceived in a moderate spirit and moulded upon the provisions of the *lex Licinia*, into which he introduced certain modifications intended to lessen the losses of those who were to be subjected to deprivation. No citizen was to be allowed to possess more than 500 *jugera* of *ager publicus*, with an addition of 250 for each child; those who had more

¹ Livy, vii. 16: "Eodem anno C. Licinius Stolo a M. Popilio Lenate sua lege decem millibus æris est damnatus: quod mille jugerum agri cum filio possideret, emancipandoque filium fraudem legi fecerit." Valer. Max. viii. 6, § 3: "C. Licinius Stolo, cujus beneficio plebi petendi consulatum potestas facta est, quum lege sanxisset, ne quis amplius quam quingenta agri jugera possideret, ipse mille comparavit: dissimulandique criminis gratia dimidiam partem filio emancipavit: quam ob causam a M. Popilio Lenate accusatus, primus sua lege cecidit."

² If we only consider the expression "possidere" as used in its legal sense to designate possession of *ager publicus*, we see its force more distinctly in the oration of Licinius to the plebeians: "Liberos agros ab injustis possessoribus extemplo, si velit, habere posse." Livy,

vi. 39. An extract from another speech still further corroborates this view, inasmuch as the subject under discussion was the actual distribution of these lands: "Anderentne postulare, ut quum bina jugera agri plebi dividerentur, ipsis plus quingenta jugera habere liceret?" Livy, vi. 38. But on the other hand the expression "*dominos*," in the speech of the patrician App. Cl. Crassus: "Altera lege solitudines vastas in agris fieri, pollendo finibus dominos," Livy, vi. 41, and especially that of "*dimidiam partem filio emancipavit*," in the passage of Valerius Maximus previously quoted, that is to say, the use of *mancipatio* (emancipavit), in order to transfer the half of one's possessions to a son, indicates not merely simple possession, but the right of property *ex jure Quiritium*.

were to be deprived of the surplus, but to be indemnified by the public treasury for any outlay which they had incurred for the benefit of the property. Lands thus recovered were to be distributed among the poorer citizens, and to be held by them at an annual rental payable to the state. Such was the *plebiscitum* he succeeded in passing B.C. 133 (*lex Sempronia agraria*). He was appointed with his brother Caius Sempronius and his father-in-law Appius Claudius as *triumviri* for the execution of this law. He had not, however, time to accomplish his task, for being accused of aspiring to arbitrary power he was assassinated in the Capitol, and fell together with his partisans in the midst of a violent reaction in favour of the class which, for the benefit of the public at large, he had attacked.¹

270. Caius Gracchus, the second of the Gracchi, who succeeded his brother in B.C. 122, was also elevated to the tribunate. Full of ardour, and enjoying great powers of eloquence, his temper was embittered by the death of his brother, and in an attempt to sustain his brother's law and to promulgate new ones of his own he also perished in a revolt, during which he found himself compelled to have recourse to his sword and to the arm of a slave in order to escape death by the hand of his enemies.

This method of removing the exponent of a principle could not, however, extinguish the principle itself, and consequently, at various intervals, down to the time of Cicero, we find laws either decreed or projected upon the same subject. Of these

¹ The whole of Roman literature posterior to the period of the Gracchi abounds with allusions to them. But it is to two Greek writers—Plutarch (*The Gracchi*, §§ 6 et seq.) and Appian (*On the Civil Wars*, l. §§ 8 et seq.)—that we are especially indebted for details, and particularly with reference to the agrarian law. The fifty-eighth book of Livy, which is especially devoted to this subject, is among those now lost. The epitome or summary of this book is limited, as regards this subject, to these words: "Ne quis plus quam quingenta jugera agri publici possideat." Cicero, *De leg. agr.*, ii. § 5, bears the following

testimony to the Gracchi, in which he distinctly marks the characteristic features of the agrarian law: "Nam vere dicam, Quirites, genus ipsum legis agrarie vituperare non possum. Venit enim mihi in mentem duos clarissimos, ingeniosissimos, amantissimos plebis romanæ viros, Tib. et Ca. Gracchos, plebem in agris publicis constituisse, qui agri a privatis antea possidebantur. Non sum ego is consul, qui, ut plerique, nefas esse arbitror Gracchos laudare: quorum consiliis, sapientia, legibus, multas esse video reipublicæ partes constitutas."

we only possess fragments of one, the *lex Thoria agraria* (B.C. 107), which was written on a table of bronze, and which was discovered in the 16th century and lodged in the collection of Cardinal Bembo, at Padua. This law indicates reaction, inasmuch as it is in favour of the possessors of the public lands, to whom it guarantees their possessions free from all incumbrance. Cicero designates it a vicious and useless enactment.¹ The *lex Thoria* was succeeded, within a space of fifty-two years, by seven agrarian laws, having various provisions tending to nullify the effect of the *lex Thoria* and to procure from the public lands certain advantages for the lower classes. Of these laws some were only proposed, others were adopted; but all remained inoperative till the time of Julius Cæsar (B.C. 59). 1. *Rogatio Marcia*. Marcius Philippus, in support of this law (B.C. 104), which was rejected, said that there were not two thousand men in Rome who were proprietors (*non esse in civitate duo millia hominum qui rem haberent*), a statement which Cicero considered treasonable. 2. The *lex Apuleia* (B.C. 100). 3. The *lex Titia* (B.C. 99). 4. The *lex Livia* (B.C. 91). Of the three tribunes by whom they were proposed, the first, Apuleius Saturninus, was forced into the Capitol and there stoned; the second, Sextus Titius, was condemned to exile for having kept the portrait of Saturninus; and the third, Livius Drusus, was assassinated on his way to his own house. This was the method adopted to prevent the enactment of objectionable laws, and the way in which their promulgators were treated, as in the case of the Gracchi. 5. The *rogatio Servilia Rulli* (B.C. 61) of the tribune Servilius Rullus, celebrated by the eloquence of Cicero, which secured its rejection. The former, which, by one of its provisions, had conceded the right of citizenship to the Italians, had caused the social war, and the latter, probably, was the cause of the Catiline conspiracy. 6. The projected *lex Flavia* (B.C. 61), supported by Cicero, but which mis-

¹ Cicero, *Brutus—De clar. orator.*, § 36: "Sp. Thorius satis valuit in populari genere dicendi, is qui agrum publicum, vitiosa et inutili lege, levavit." (Appian., *Civil Wars*, 1, 27.) The fragments of the *lex Thoria* have

been published in several selections. Sigonius undertook its reconstruction (*De ant. jur. Ital.*, ii. 2), and later Haubold (*Antiq. Rom. monumenta*, &c., Berlin, 1830), Klenze, and lastly Rudorff.

carried. And, finally, 7. *Lex Julia agraria* (B.C. 59) of Julius Cæsar, the consul, which ordered that the public lands of Campania should be distributed amongst the poor citizens who had three or more children; a distribution which, it is said, benefited more than 20,000 heads of families. The agrarian agitation thus terminated in laws respecting the division of public lands in certain districts; to which must be added those relating to the establishment of colonies and the distribution of lands among the soldiery.

271. In connection with the agrarian laws, though of less importance, were the *leges frumentariæ*, regulating the distribution, sometimes at a reduced price and at others even gratuitously, of wheat. These commenced with the *lex Sempronia frumentaria* (B.C. 123) of Caius Gracchus, and were followed by several others of a similar nature. Suetonius tells us that the number of persons receiving corn from the state was, at the time of Julius Cæsar, no fewer than 320,000, and that this number was reduced by Cæsar to 150,000.¹

Toward the middle of the seventh century from the foundation of Rome, and during a period of rather more than thirty years, our attention is fixed upon four prominent features: first, the *quæstiones perpetuæ*, which followed one another in succession; secondly, the *leges judiciariæ*, by which the judicial power was transferred first from the senate to the knights and again from the knights to the senate; thirdly, the authority of the *senatûs-consultum* in matters of civil law, and lastly, the *jus honorarium*.

¹ *Lex Marcia*: CICERO, *De offi.*, ii. 21. *Lex Apuleia*: APPIAN, *Bell. civ.*, i. 29 and 30; CICERO, *Pro Balb.*, 21; AUR. VIC., *De vir. illust.*, 73; PLUTARCH, *Marius*, 29. *Lex Titia*: CICERO, *Pro Rabir.*, 9; *De leg.*, ii. 6; *De orat.*, ii. 11; VAL. MAX., viii. 1, § 2. *Lex Livia*: APPIAN, *Bell. civ.*, i. 35 and 36; VELL. PATERC. ii. 13 et seq. *Lex Servilia Rulli*: CICERO,

Three Speeches, *De leg. agr.*; PLUTARCH, *Cicero*, 16 and 17. *Lex Flavia*: CICERO, *Epist. Attic.*, i. 18 and 19, ii. 1. *Lex Julia agraria*: APPIAN, *Bell. civ.*, ii. 10—14; DION. CASS. xxxviii. 1 et seq.; SUTTON, *J. Cæsar*, 20; PLUTARCH, *J. Cæsar*, 14; VELL. PATERC. ii. 14; CICERO, *Epist. Attic.*, ii. 16.



SECTION LI.

QUESTIONES PERPETUÆ.
COGNITIONES EXTRAORDINARIÆ.

272. From the earliest period of Roman history there is nothing to mark with any particular characteristic feature the jurisdiction in criminal matters. Under the kings this jurisdiction belonged to them, right of appeal (*provocatio*) in all capital cases lying to the people, that is to say, to the aristocratic *comitia* by curies. After the foundation of the republic, and especially after the passing of the *leges Valeriæ* and the Twelve Tables, it became a fixed principle that the *comitia* by centuries could alone pass capital sentence in the case of citizens.

273. The *comitia tributa* had also acquired by custom a certain repressive jurisdiction, and we even find them, contrary to the fundamental law of the state, deciding a capital case with reference to Coriolanus; but it must be observed that a *senatus-consultum* declared that this should not be a precedent.¹ As a general principle, the power possessed by the tribunes was rather that of political than judicial repression, whereas the *comitia centuriata* had jurisdiction in criminal matters and capital offences. The *comitia tributa* summoned magistrates before them upon the termination of their office, as also men of station and rank when accused of having infringed any public law, either affecting the rights of the people or the plebeians; and though, properly speaking, they exercised no criminal jurisdiction, yet in these exceptional cases they sentenced offenders to fine, or to such other penalty as the justice of the case demanded. In the case of the *comitia centuriata* and the *comitia tributa* the right of accusation was not at this period a public right enjoyed by every citizen. The magistrates who convoked these assemblies, the consuls, the prætors and the tribunes alone had the right of charging the offender, and therefore it was necessary for a citizen to appeal to these magistrates in order to get them to lodge the necessary accusation.

¹ Dion. 7, 58.

274. In addition to the *comitia*, the senate also exercised the functions of criminal jurisdiction, for being charged with the executive administration of the republic at a period when the various powers in the state had not been accurately defined, they did not hesitate to take an active part in the supervision of public affairs and to arrest obnoxious characters, especially in cases in which the state was liable to be compromised. Excepting, therefore, capital offences, committed during periods of agitation, as for instance, in political seditions, and even sometimes in the case of sacrilege, and excepting certain particular cases, such as pontifical matters, the senate had and exercised a criminal jurisdiction undefined by any precise law, and itself regulated the penalty or punishment for crime; provided, of course, that it was not capital. This power was especially applicable to all matters connected with the provinces or the person of an individual *peregrinus*. We may observe that a great number of inferior offences, less directly affecting the state, were, under the title of *delicta privata*, left entirely to be dealt with by persons who might seek redress before the civil tribunal.

275. The superior authorities then in criminal matters were 1st, the kings; 2nd, the *comitia curiata*, subsequently the *c. centuriata*, and finally the *c. tributa*; and 3rd, the senate. But there was an important custom which dated from the time of the kings, and continued through subsequent periods, which should be noted, viz., that these superior authorities, when any criminal matter was presented to them, either took cognizance of and determined it themselves, or delegated the investigation (*quæstio*) to a *comitia* (*quæstores*), specially summoned for the particular case.

We find from history that this practice was constantly resorted to. In this way the king delegated the investigation (*quæstio*) to the patricians; the *comitia* delegated it, at one time, to the senate, at another, to *quæstores*. The senate delegated it to consuls, to prætors, and to the various governors of provinces. These delegations of criminal jurisdiction, or, adopting the technical language, these *quæstiones*, were generally

speaking, made with reference to the particular case; and when it was determined, the commission or *quæstio* expired. In certain circumstances, however, these *quæstiones* had a more general character: the commission (*quæstio*) was appointed either by the senate within the limits of its jurisdiction, or by the *comitia*, for some specific class of public crime—as, for example, *de clandestinis conjurationibus*, as in the matter of the Bacchanalian orgies, B.C. 186;¹ for the crime of poisoning, *quæstio de veneficiis*, B.C. 184;² for the crime of homicide, *quæstio de homicidiis*. Thus we see throughout this period of Roman history the *comitia* delegated certain functions to the senate, and it—the senate—in the same way delegated its authority to the consuls, to the prætors, to the governors of provinces, or to the *quæstores* appointed by it for a given purpose.

276. Thus this practice, which had its origin in custom, became more and more a necessity in proportion as the population increased and crime multiplied. It was subsequently regulated by *plebiscita* and successively applied to the most flagrant crimes, and finally developed into what was known as the *quæstiones perpetuæ*. The origin of these *quæstiones perpetuæ* may be ascribed to the *lex Calpurnia repetundarum*, B.C. 149.³

277. The system of the *quæstiones perpetuæ* rescued the Roman criminal law from the arbitrary character which, in several respects, it had acquired, and determined, with the exactitude of a legislative enactment, each crime as it was submitted to the *quæstio*, its penalty and the method in which it should be dealt with.

In fact, in place of *quæstiones* being given for each particular case, or for certain crimes committed upon a given occasion, or in any given locality, without any general legislative enactment—in place of this uncertain and arbitrary system, a special law

¹ Livy, 39, 6.

² Livy, 39, 38.

³ Cicero, *Brutus*, *De clar. orat.*, § 27: "Quæstiones perpetuæ hoc adulescente (C. Carbon) constitutæ sunt,

quæ antea nullæ fuerunt. L. enim Piso tribunus plebis, legem primus de pecuniis repetundis, Censorio et Manilio consulibus, tulit."

for each delict (for example, a law for bribery, another for extortion, and so on) organized a *quæstio perpetua*; that is to say, the crime was itself defined, the penalty regulated and the class of tribunal, together with the mode in which it should be conducted, definitively determined.

278. Although this delegation, this right of investigation (*quæstio*), was called perpetual, and although, by a figure of speech, the name *quæstio perpetua* was applied to the tribunal itself, nevertheless, in accordance with the principle which regulated the constitution of Roman magistracies, the tribunal, as regards the individuals composing it, was simply annual, though its organization was fixed and perpetual. It was presided over by a prætor; generally by one of those officers who had no other special jurisdiction. The sentence was not passed by permanent judges, but by citizen judges, or a species of *judges jurés* (jurymen), selected for the occasion; the governing principle being that the judges in each case were selected by the consent of the parties. These judges were numerous, sometimes as many as one hundred sat in the same case, as determined by the law regulating the *quæstio perpetua*.

279. Any citizen could be the prosecutor before a *quæstio perpetua*. It was his business to point out the accused, the law upon which he brought his accusation, and the crime that was imputed. At the same time he had to take an oath that his accusation was not calumnious. He thus became a party to the cause, and was compelled to furnish the necessary proof. The jury was obliged to pronounce its verdict according to the law of the particular case,—either to acquit, to condemn, or to declare that they had not sufficient proof (*Condemno, Absolvo, Non liquet*). They had no power to modify the punishment prescribed.¹

280. Under this system each crime had its law, its penalty, its tribunal, and its procedure. Every detail was regulated by the law which organized the *quæstio*: the number of judges or

¹ Cicero, *Pro Cluentio*, 10, 20, 33, 53 et seq.; *Pro Sylla*, 22.

jurymen (these were sometimes thirty-two, fifty, sixty-five or a hundred, as the case might be); the mode of selection; the right of rejection; the witnesses; the time allowed to the accuser and the accused; in short, every detail connected with the entire proceeding.

There is inscribed upon the back of the bronze, upon which is written the *lex Thoria agraria*, a specimen of one of these enactments. It consists of certain fragments of the *lex Servilia repetundarum*, passed either in the year B.C. 106 or B.C. 100, from which we get an insight into the organization of these *quæstiones*.

281. The crimes thus provided for by a special law became the object of their respective *quæstio perpetua*, and were thus withdrawn from the arbitrary and uncertain procedure of the primitive system. Those crimes, to which this system had not been applied, continued to be subject to arbitrary decision, and were dealt with as before, being entertained either by the *comitia* or by the senate, or being delegated to the consuls, the prætors or to special *quæstores*. This is what is termed the *cognitiones extraordinariæ*, *extra ordinem cognoscere*, in criminal matters.

282. The following is a table of the early *quæstiones perpetuæ*:—B.C. 149, *lex Calpurnia, De repetundis*, *quæstio pecuniæ repetundæ*, against extortions or exactions in the provinces. B.C. 119, *lex Maria, De ambitu*, *quæstio ambitus*, against bribery in the purchase or illegal attempt to obtain a magistracy. In the same year the *quæstio peculatus*, against peculation, that is to say, theft, or misappropriation of public funds, whether sacred or secular. B.C. 102, the *lex Apuleia, Majestatis*, *quæstio de majestate*, or treason, including all overt acts prejudicial to the sovereignty of the people. In the same year the *lex Lutatia, De vi*, *quæstio de vi*. In B.C. 95, *lex Licinia Mucia, De civitate*, *quæstio de civitate*. In B.C. 89, *lex Fabia, De plagio*, *quæstio de plagio*. And finally, under Sylla, we find the establishment of *quæstiones perpetuæ* for crimes committed against private persons, such as fraud and murder.

SECTION LII.

THE JUDICIARY LAWS (*Leges judiciariæ.*)

283. The Romans, as we have seen, had from the earliest times the trial by jury both in civil and in criminal matters. Informal and indefinite as was this proceeding in the beginning, the formula system organized a most ingenious method for the trial of civil causes, and the *questiones perpetuæ* regulated in each case the mode of trial for the crimes submitted to each individual *questio*. It was also a fundamental principle, that the parties should agree to their judge; whether they themselves chose him by common consent, or whether he was indicated by the magistrate, or whether his choice was determined by lot. And it is certain that, to a great extent, the parties retained the power of rejecting; but we have to inquire who the citizens were who might act as these judges or jurymen both in civil and criminal matters. For a long time the patricians had the monopoly of this right, which monopoly was only broken by the institution, already referred to, of *recuperatores*, and by the interference of the Quiritarian tribunal of the *centumviri*; but, except as to these encroachments, the patricians retained this monopoly till the time of the Gracchi. The judge must be taken from the senatorial order.

284. Under the tribunate of the second Gracchus an obstinate struggle commenced concerning the qualification necessary for a judge. This struggle, which continued for a lengthened period, introduced various changes, till at last the monopoly was destroyed, and the right became general. It was upon the rogation introduced by C. Gracchus that a *plebiscitum* took from the senators this right and transferred it to the knights. This is the first judiciary law (*lex Sempronia judiciaria*, B.C. 122), destined to be followed by a series of laws abrogating or modifying one another, as the senators or the knights happened to gain the temporary ascendancy. B.C. 122, the *lex Sempronia judiciaria* gave it to the knights; B.C. 106, the *lex prima Servilia jud.* divided it between the two orders;

B.C. 100, the *lex secunda Servilia jud.* conferred it upon the knights; B.C. 91, the *lex Livia jud.* divided it between the two orders; B.C. 82, under Sylla, the *lex Cornelia jud.* gave it to the senators; B.C. 70, under Pompey, the *lex Aurelia jud.* and the *lex Pompeia jud.* B.C. 55, divided it between the two orders. To these we must add the *leges Juliae judicariæ*, either under Cæsar, B.C. 46, or under Augustus, B.C. 25.

285. We have next to inquire to what class of cases this much disputed privilege, which was the subject of such bitter and prolonged contention between the rival orders—the privilege of acting as judge—appertained; whether to criminal matters only or to both criminal and civil, or to civil suits exclusively. Notwithstanding the doubts raised by certain passages, we conclude that it extended to civil and criminal matters. There is no doubt this was the case in the reign of Augustus.¹

286. At the time when the senatorial order enjoyed the monopoly the list of judges was fixed and permanent. It was a senatorial list (*ordo senatorius*), and in number three hundred. But when the qualification was extended, it became necessary to make an annual list. The duty of constructing this list was imposed upon the *prætor urbanus*, who, after taking an oath not to admit any but citizens of the better sort, publicly, in the forum, selected the prescribed number from the duly qualified class.² The list, when complete, was attached to the “album,” and these judges were known as the *judices selecti* or *judices in albo relati*, and acted for the period of one year. By the *lex Aurelia* the list consisted of three decuries (*decuria judicum*): the first giving the number of senators, the second the knights, and the third the treasury tribunes. This system of decuries, with certain variations as to number and the status of the members, was permanently maintained. At a later period, under Augustus, it was divided into four; under Caligula

¹ “Ad tres judicium decurias quartam addidit ex inferiori censu: quæ *ducentariorum* vocaretur, judicaretque de levibus summis.” Suet., *Oct.*, 32; Aul. Gell., *Noct. attic.*, 14, 2; Seneca, *De*

benefic., 3, 7.

² “Prætores urbani, qui, jurati, debent optimum quemque in selecto judices referre.” Cicero, *Pro Cluent.*, 42.

there were five *decuriæ*, each distinguished by a particular name.¹ The qualification for inscription became less stringent: even the military were admitted, whatever might be their position in the census, nor was the right denied to citizens occupying a lower position than the knights (*ex inferiori censu*). The total number of these *judices* that was inscribed upon the annual lists was successively raised from three hundred and three hundred and sixty to eight hundred and fifty, and finally, under the Emperor Augustus, to about four thousand.²

SECTION LIII.

ON THE AUTHORITY OF THE SENATÛS-CONSULTA.

287. Notwithstanding that the assertion of Theophilus as to the double effect of the *lex Hortensia*, that by a species of compromise it at one and the same time gave the authority of law to the *plebiscita* on the one hand and to the *senatûs-consulta* on the other, is not to be found in any other writer who refers to this law, the suggestion that it had a double action is not improbable. The right of the senate as to the enactment of laws was considerably restrained from the time of the passing of the *lex Hortensia*, for so far as the *plebiscitum* was concerned it was not necessary that the senate should give its *auctoritas* either for the initiation of the enactment, nor for its final sanction when once it had been voted; and as this form of legislation became more and more frequent the legislative powers of the senate gradually passed away. It was, therefore, forced to seek from other sources the means of intervening upon extraordinary occasions; as, for instance, when by a *senatûs-consultum* it prohibited the tribune, L. Saturninus, from laying before the *comitia* the proposition for the *lex fru-*

¹ "Decuriæ quoque ipsæ pluribus discretæ nominibus fuere, *tribunorum æris, et selectorum, et judicum*." Plin., *Hist. natur.*, 33, 7. To which we must add the fourth, the *ducenarii*. Vide note, § 285.

² Three hundred and sixty according

to Velleius Paterculus, 2, 76, and Plutarch, *Pomp.*, 55. Eight hundred and fifty according to Cicero, *Ad Attic.*, 8, 16. About four thousand, one thousand in each *decuria*, under Augustus. Vide Pliny, *Hist. nat.*, 33, 7.

mentaria in B.C. 654. "*Senatus decrevit, si eam legem ad populum ferat, adversus rempublicam videri eum facere.*" When the tribune, notwithstanding the *senatûs-consultum*, and notwithstanding the intercession of his colleagues, persisted in his course, the *quæstor urbanus*, Q. Cepio, regarding his act as one of revolt against the senate and injurious to the republic, together with some other citizens, broke into the *comitia*, overturned the platform, threw away the ballot boxes, and prevented the vote being taken. This conduct resulted in a charge of treason.¹ Even in the *comitia centuriata* it more than once happened that, contrary to principle, propositions were carried by the magistrates without the preliminary authority of the senate having been obtained.

There was a political struggle and a disturbance of the ancient régime, and it is more than probable that Theophilus had before him certain judicial documents, lost since the compilation of Justinian, which was the field of Theophilus's labours. And in these documents there were probably accounts of these struggles, and upon this basis Theophilus may have grounded his assertion.

288. But be this as it may, Cicero enumerates the *senatûs-consulta* among the contemporary sources of the civil law in terms almost identical with those which at a later period were adopted in the Institutes of Gaius and of Justinian.² And Pomponius, without referring it to the *lex Hortensia*, of which he has spoken in the previous paragraph, mentions the *senatûs-consulta* as a source of law, and represents it as having become so at a later period (*deinde*), to a certain extent as a result of necessity and custom (*necessitas ipsa curam reipublice ad senatum deduxit*), and from the interposition of the senate. "*Ita cæpit senatus se interponere; et quidquid cõstituisset observabatur, idque jus appellabatur senatûs-consultum.*"³ The

¹ Cicero, *Rhetorica ad Herennium*, 1, § 12.

² Cicero, *Topic.*, § 5: "Ut si quis ius civile dicat id esse, quod in legibus, senatûs-consultis, rebus iudicatis, jurisperitorum auctoritate, edictis magistra-

trum, more, sequitate consistit." See Gai., *Inst.*, 1, § 2, and Justinian, 1, § 8.

³ Dig. 1, 2, *De orig. iur.*, 2, § 4.
Pomp.

reason which he assigns, viz. the difficulty of assembling the plebeians or the people, is a reason conceived at a later period under the empire. But what Pomponius has said is sufficient to convince us that there never was any law conferring on the senate, in addition to its governmental or administrative functions, the right of legislating. If certain *senatûs-consulta* (which is incontestable) were at a later period of the republic enacted concerning points of private law, this was because these matters referred more or less directly to public interests which were confided to the keeping of the senate, or came under the head of those instructions or orders given from time to time by magistrates.

289. The number of the *senatûs-consulta*, upon matters of private right, prior to the empire, is exceedingly small. The most important is that which introduces the principle that the freeman who fraudulently, and in order to participate in the price paid, should suffer himself to be sold as a slave, could not recover his liberty. This provision remained in force even till and under Justinian, and appears from Sempronius to be derived from a *senatûs-consultum*. From a fragment of Paul it appears that it was in existence at the time of Quintus Mucius.¹ The *senatûs-consultum* (the provisions of which we learn from Ulpian) upon the right to bequeath the usufruct of the entire patrimony, and consequently of consumable articles,² is also of ancient date, but we may conclude from a passage in Cicero's Topics that it did not exist at the time when Cicero wrote that work.³ The date is uncertain. At a much earlier period, namely, B.C. 177, we find the *senatûs-consultum* by which the senate enjoined upon magistrates, before whom an enfranchisement could be made by the vindictor, the duty of imposing upon the parties, under pain of nullity, the oath that the manumission was not made for the purpose of affecting his citizenship (*civitatis mutandæ causa manu non mittere*). We find from a passage in Livy the effect of this *senatûs-consultum*

¹ Dig. 40, 13, *Quibus ad libert. proclam. non licet*, 3, f. Pomp.; 40, 12, *De liberat. caus.*, 23, pr. f. Paul.

² Dig. 7, 5, *De usufr. ear. rer. quas usu consum.*, 1, f. Ulp.

³ Cicero, *Top.*, § 5.

upon the census and status of the Latins in respect to citizenship.

A still earlier date, B.C. 236,¹ must be ascribed to the *senatûs-consultum*, by which the senate, in order to recompense the enfranchised Hispala Fecenia for having discovered the Bacchanalian orgies, conferred upon her, as to marriage and tutelage, extraordinary privileges. But this *senatûs-consultum* was carried as a proposed enactment before the *comitia* and voted for.²

It was a principle in fact that the *senatûs-consultum* could not directly abrogate any civil law, and even in later times and under the empire we find that the senate, in the innovations introduced by it, preferred the form of giving orders to the consuls, to the prætors, or to the other magistrates, of giving advice, or interposing its authority, of giving or refusing certain *actiones*. The two *senatûs-consulta*, *Velleianum* and *Macedonianum*, which belong to the imperial period of which we have the text in the Digest, furnish us with two remarkable examples.³

SECTION LIV.

JUS HONORARIUM—EDICTUM—EDICTUM PERPETUUM—
EDICTUM REPENTINUM—INTERDICTUM—EDICTUM
TRALATITIVUM—LEX CORNELIA, DE EDICTIS.

290. Our attention is now turned to a new branch of law, and the question how it came into existence,—whether it was the result of a special enactment, or whether it derived its force from custom? The latter hypothesis appears to me the more probable.

From the earliest periods the magistrates, that is to say, the consuls, and at a later epoch the prætors, the curule ædiles, the censors, and even the plebeian tribunes, had the right of publishing orders and notices connected with their respective

¹ Livy, xli. 9.

² Livy, xxxix. 19.

³ Dig. 14, 6, *De sen. cons. Mac-*

doniano, 1 pr. f. Ulp.; 16, 1, *De sen. cons. Velleiano*, 2, § 1, f. Ulp.

functions; this right was styled the right *e-dicere*, which is the symbolic term of the Roman magistracy (see *Dico*, § 42).

291. The use of this expression, however, more particularly belonged to those magistrates who had a certain jurisdiction; for instance, at Rome, to the *prætor urbanus*, the *prætor peregrinus* and to the two *ædiles*, and, in the provinces, to the governor. The jurisdiction, as the term itself indicates, consisting in the general capacity to declare the law. This power could be exercised in various ways; for example, *jus dicere* was to declare the law, to organize the *formula* in the suit; *addicere* was to award the property in controversy by the declaration of right; *edicere* was to declare the law in a general manner, so that such enunciation of it should serve as a rule for the guidance of all; *interdicere* was to declare a similar rule which should govern the conduct of a particular suit. *Jus dicere*, *addicere*, *edicere*, *interdicere*, belonged to the same family of words; the two last have more especial reference to the *jus honorarium*.

292. Under a system of legislation like that of Rome at a period when the separation between the legislative and the judicial functions, now familiar to us, did not exist, the magistrates charged with any given jurisdiction were of necessity compelled to publish rules or instructions as to the mode in which they proposed to act during their tenure of office; as to the means that they intended to employ to secure the execution of the laws with whose administration they were charged; as to the course that must be pursued by private individuals seeking to establish their claims. "*Judicium dabo; in duplum judicium dabo; agere permittam; actionem causa cognita dabo*"—"I will allow an *actio*; I will allow an *actio in duplum*; I will allow an *actio* to be brought; I will allow an *actio* after examination." "*Interdicam*"—"I will give an *interdictum*." "*Animadvertam*"—"I will punish or I will provide for." "*Ratum non habebo*"—"I shall not consider valid." "*In integrum restituum*"—"I shall restore in its entirety." Such were the phrases which formed the conclusion of various provisions of the *prætor*. These rules thus published (*e-dicta*) occupied a

place side by side with the law, invested with the authority of the magistrate, as the living and flexible portion of the civil law. "*Viva vox juris civilis*," as says the jurist Marcianus.¹

293. The *prætor urbanus* would, in the discharge of his duties, necessarily meet from time to time with cases for which there was no provision, or with others to which the application of the law appeared unjust. He would therefore feel the necessity of supplementing this law or correcting it by such means as were within his power, and he would consequently declare that in such cases he should adopt a given course. The *prætor peregrinus*, on his part, had, so to say, to ascertain and to build up a new system of law, the *jus gentium*. He found nothing of this in the civil law; and it was consequently necessary, in order to avoid arbitrary action, that he should state certain rules and lay down certain principles. As to the *ædiles* charged with the general administration of the police, they had also to draw up certain rules concerning the public games, the construction and maintenance of roads, markets and sales, and other matters which came under their cognizance and jurisdiction. And in the provinces, again, the governor on arriving in the conquered country which had become his charge found that he was called upon to amalgamate the laws of the country with those of Rome; so he, too, was equally under the necessity of laying down the principles by which he intended to be guided. Thus, as Papinian says, the right to make edicts designed originally as a function of the executive power, and as an auxiliary to the civil law, came to be employed to supplement and to correct the law, and this without there being any definite initiatory legislative act. It grew up as the result of custom—an offshoot generally of the ideas and institutions of the period, having its origin in expediency (*propter utilitatem publicam*). "*Adjurandi, vel supplendi, vel corrigendi juris civilis gratiâ*," says Papinian.²

¹ Dig. 1, 1, *De justitia et jure*, 8, f. Marcian.: "Nam et ipsum jus honorarium viva vox est juris civilis."

² Dig. 1, 1, *De justitia et jure*, 7, § 1, f. Papinian: ". . . Jus præto-

rium est, quod prætores introduxerunt adjuvandi, vel supplendi, vel corrigendi juris civilis gratiâ, propter utilitatem publicam: quod et honorarium dicitur, ad honorem prætorum sic nominatum."

294. In the course of time the precedents relating to the right of publishing edicts (*jus edicendi*) were systematised. It became necessary to publish the edicts at the commencement of the magistrate's term of office. "You must," says Cicero, "as soon as you have entered upon your magistracy and taken your seat, publish by an edict the rules that you intend to observe during the term of your office."¹ The magistrates who had published their edicts were bound by them; and this necessity was imposed upon them by a special law, the *lex Cornelia*, enacted in the time of Cicero.² This deprived the prætors of the power of varying their judicial decisions as partiality or ambition might dictate. Cicero makes deviations from his published edict one of the chief accusations which he brought against Verres.³ The edicts thus became obligatory for one year, and for this reason Cicero calls them the *lex annua*. "The calends of January put an end," says he, "to the edict of the prætor."⁴ In fact, as the edicts were nothing more than the orders published by a magistrate and were not legislative enactments, they expired with the power from which they emanated, and each new magistrate, by appropriating or rejecting them, either maintained or abolished the decrees of his predecessor. More

¹ "Est enim tibi (jam quum magistratum inieris et in concionem adscenderis) edicendum, quæ sis observaturus in jure dicendo."

² Asconius, *In argum. Cornel.*: ("Legem Cornelius tulit) ut prætores ex edictis suis perpetuis jus dicerent, quæ res tum gratiam ambiciosi prætoribus, qui varie jus dicere assueverant, sustulit." It is to this *lex Cornelia* that certain authors refer the right conferred upon the magistrates of publishing their edicts. The fact is, that it commanded the prætors to publish an edict at the commencement of their term of office and to conform themselves to it throughout the year. It regulated the publication of the edicts, but we must not suppose that it introduced them. Cicero, in his oration against Verres, complained of the provisions introduced by that magistrate in his edict, and at the injustice of some of his decisions, which conformed to his interest and not to the terms of his edict. The proceeding against Verres, it must be

noticed, is anterior to the *lex Cornelia*. We also find in a law discovered in the last century, the *lex de Gallia Cisalpina*, mention of the edict of the Prætor Peregrinus, but we cannot infer anything certain from it, inasmuch as we do not know whether this was anterior to the *lex Cornelia*; and it can be placed either during the Punic wars, when Cisalpine Gaul was reduced to the condition of a province (Beaufort, ii. p. 318), or, in our opinion, to a later period, namely, B.C. 49, when this part of Gaul received the right of citizenship (see § 312). I adopt the opinion that the edicts owe their origin to custom, and that the laws were published to regulate them in the early part of the seventh century from the foundation of Rome.

³ Cicero, *In Verrem*, 1, §§ 42, 46.

⁴ Cicero, *In Verrem*, 1, 42: "Qui plurimum tribuunt edicto, prætoris edictum legem annuam dicunt esse."—"Finem edicto prætoris afferunt kalendæ Januarii."

frequently, however, and in proportion as the edicts, by the force of this constant revision and annual publication, became perfected and such as no objection could be taken to them, they came to be considered as complete, and, with the exception of some occasional modifications in points of secondary importance, were generally retained. Some provisions were of such obvious utility that they were transmitted year by year, and came at length to be regarded as unchangeable. In this way long use imparted to them the force of law, and it is for this reason that Cicero ranks them as an important portion of the customary law.¹ At a later date the prætorian edict became a portion of the *lex scripta*.

295. We must distinguish the various edicts, those at least which are particularly connected with the history of Roman private law. These were, first, the edicts of the prætor, *prætoris edictum*; second, of the ædiles, *edictum ædilium* or *ædilitium edictum*; third, of the proconsuls or proprætors, *edictum provinciale*. These were called *edicta perpetua*, because they were not made for any particular case, but, although annual, for the perpetual jurisdiction to which they severally appertained (*jurisdictionis perpetuæ causa; non prout res incidit*). The magistrate, and the edict published by him, both went at the same time, but the office of the magistrate, together with the perpetual edict, remained. This was not the case with those edicts which were declared for a specific matter on the spur of the moment (*repentine*), in order to meet a case in point. Edicts of this kind, which were matters of pure accident, might exist under one prætor and not under another, and had no continuing force; they were called *edicta repentina*.² Sometimes even the prætor declared, as a special edict, the law which

¹ Cicero, *De invent.*, ii. 22: "Consuetudinis autem jus esse putatur id quod voluntate omnium sine lege vetustas comprobavit. In ea autem jura sunt quedam ipsa jam certa propter vetustatem, quo in genere et alia sunt multa, et eorum multo maxima pars, quæ prætores edicere consueverunt."

² Cicero, *In Verrem*, iii. § 14: "Exoritur peculiare edictum repentinum, ne

quis frumentum de area tolleret antiquam cum decumano pactus esset." "Illud edictum repente uberrimum et quæstuosissimum nascitur," &c. He here refers to two edicts of Verres, made during his prætorate in Sicily, the object of which was, under the form of a general order, to sanction the conduct of a certain collector.

should govern the litigation in the individual case between two parties. This was termed *interdictum*, that is, a species of *edictum inter duos*. The *edictum tralatitium* was that which was retained, and handed on from one magistracy to the other. The *edictum novum* described the innovations or amendments made from time to time.

296. Those decisions which had been established by custom and transmitted from edict to edict, formed a species of magistrate-made law known as the *jus honorarium* or "honorary law. It consisted of two principal parts, prætorian law (*jus prætorium*) and ædile law (*jus ædilium*), of which the former is far the more important. This is the origin of that prætorian law which advanced, so to say, in a parallel line with the Roman civil law. It did not rest upon any direct legislation; it admitted of modification, and was grounded on the principles of equity and natural justice; it contributed in a great degree to Roman civilization, and prepared the way for the gradual disappearance of the old legal system. It was a work of science, of philosophy and of progress, and step by step supplanted the primitive Quiritarian law. We find Cicero, even in his time, complaining that the Twelve Tables were no longer studied as heretofore, and saying that they were replaced by the edicts of the prætor.

297. The Romans, not content with the success which they had achieved against Carthage and Macedonia, carried their conquests into remote regions. Jugurtha, the king of Numidia, resisted their power, not however with arms, but with gold. He bought the suffrages of the senate and purchased peace; nay, he purchased the defeat of a Roman army. Rome, he said, would perish, could it find a buyer to purchase its destruction. Ultimately, however, he adorned the triumph of Marius, and Numidia was ranked amongst the Roman provinces. It had assisted in the subjugation of Carthage, and was in its turn subdued. On the banks of the Varus, the Rhone and the Iser, the Roman legions encountered the barbarians of Gaul. The Cimbri and the Teutons, emigrants from Germany to a

southern clime, were exterminated; and our attention is now directed to the social war, the civil wars, and the servile wars, which rapidly followed each other.

SECTION LV.

THE SOCIAL WAR.

298. B.C. 91. The allies of Latium and of Italy had been instrumental in building up the power of Rome, but the title and the rights of Roman citizenship were denied them. For many years past, tribunes who had been solicitous to obtain supporters had been in the habit of promising laws which should remedy this state of things. Upon such occasions the allies crowded into Rome, thronged the public places of assembly, and waited for fulfilment of these promises, but without effect. Italy rose in arms; the standards of the allied towns, of the municipal towns, and of the colonies themselves, were borne from every part of Italy towards the Roman capital. The war was a short but a bloody one. Consuls, Roman legions and allied legions perished in the struggle. Italy lost no fewer than three hundred thousand men, and Rome finally triumphed, by first enrolling within the numbers of its citizens those who had not taken up arms, or who were the first to lay them down, and afterwards by admitting those who were still able to retain them (*lex Julia*, B.C. 90; *lex Plautia*, B.C. 89). Thus in the space of two years the rights of Roman citizenship were acquired by nearly the whole of Italy, including the suffrage, the only condition imposed being that of a declaration that the new citizens should adopt the civil law of Rome. But in order to diminish the influence of these new citizens, they were placed in eight new tribes, which were added to the already existing tribes, so that in all public deliberations the whole of Italy had but eight votes, whereas Rome had thirty-five. This disproportion did not last long, for the Italians soon succeeded in securing their distribution amongst the thirty-five Roman tribes.

But

Montesquieu, pray to be permitted to turn away his eyes from the wars of Marius and Sylla.

Sylla having triumphed and been proclaimed perpetual dictator, humbled the plebeians, compromised the tribunes, debased the knights, and elevated the senators. The assemblies by tribes were dissolved, and the *comitia centuriata* invested with all power. Sylla, in fact, desired to restore to the senate its pristine splendour, and to the republic its primitive energy. He wished to restore its virtues, its public spirit, and, above all, its liberty; and it was perhaps this last consideration which induced him, after having retained his office of dictator for five years, to abdicate—an act which history has regarded with astonishment.

Some of his laws must be noticed (B.C. 81). The *lex Cornelia judicaria* deprived the knights of civil power and restored it to the senators. The *lex Cornelia de falsis*, also called *testamentaria*, and the *lex Cornelia de sicariis*, which established two new *questiones*, one for crimes involving fraud principally in matters connected with wills, and the other against murderers. It is probably to this last law that the Institutes of Justinian refer¹ as making provision for the case of certain injuries committed with violence.

SECTION LVII.

THE SERVILE WARS.

301. B.C. 72. So violent were the struggles and so great the troubles of this period that the wars of the slaves passed almost unnoticed. It is a question, however, whether they are not more worthy of our attention than either of the others. An innumerable number of captives, collected from all parts of the world, were crowded together on the estates of the wealthy Romans, some of whom possessed even thousands of these unhappy people. At the time to which our attention is now directed the slaves of Italy rose in arms, broke their fetters, and, assuming

¹ Lib. iv. tit. 4, § 8.

the character of soldiers, took the field to the number of 60,000. The troops which were sent against them were defeated; the forces of four prætors were destroyed; but the slaves eventually succumbed to a consul, and received, instead of the liberty which they had sought, the cruel death of the slave,—the punishment of the cross. But they had left successors, and a new army appeared in the field. This second attempt was at first rewarded by success, but the success was only temporary. The slaves allowed themselves to be blockaded, and reduced to the last extremity by famine; they killed each other in order to escape the vengeance of their masters. The gladiators of Capua, escaping from their bondage and raising the cry of liberty, caused the third servile war. The illustrious Spartacus, clad in consular purple, at the head of the insurgents, ravaged Italy and put the Roman legions to flight. But he fell before the united strength of Rome, and the chief, with his followers, perished by their own hands rather than seek for quarter. Thus terminated the efforts of the slaves to obtain their freedom.

302. B.C. 70. The civil wars had not died out with Marius and Sylla. Catiline, Pompey, and Cæsar, Antony and Octavius followed in their wake. The work of Sylla was destroyed by Pompey. The plebeians recovered their assemblies, the tribunes their privileges, the knights their judicial power, and this they shared with the senate and the treasury tribunes. But it is of no avail to study these ephemeral laws which clash against and alternately annul each other—convulsive movements indicative of the approaching dissolution of the republic. Pompey, it is true, marched his legions into Asia, vanquished Mithridates, overran Armenia, Colchis, Albania, Syria, Arabia, and led his legions even to Jerusalem, but it was only to hasten this dissolution.

303. We pass rapidly over these latter years of the republic, over the compact or rather league formed between Pompey, Crassus and Cæsar, under the name of the triumvirate, B.C. 64. They united themselves in order that they might command the

senate, dictate the choice of candidates, and divide between themselves the provinces. Pompey had Spain, Crassus Syria, and Cæsar the Gauls. It was at this period that this general, who retained the power in his hands for ten years, explored those unknown regions described in his immortal Commentaries, and penetrated as far as Great Britain, conquering on his route all the barbarians with whom he came in contact.

304. Let us pass over the struggle between Pompey and Cæsar. Ambition united them, and ambition brought about their separation. Cæsar had passed the Rubicon with, as Cicero tells us,¹ these lines of Euripides upon his lips, thus rendered by the Roman orator :—

“ Nam si violandum est jus regnandi gratia,
Violandum est; aliis rebus, pietatem colas.”

He vanquished Pompey in Thessaly, Scipio and Cato in Africa, and the sons of Pompey in Spain. The senate and the Roman people gave themselves into his hands. Consulates were lavished upon him, and he was finally made perpetual dictator, a condition of affairs which Brutus and his co-conspirators terminated at the end of six months by the assassination of the dictator in the midst of the senate, as if they would destroy this office with the same weapon as that with which they had destroyed the laws—the sword. B.C. 45.

Before Cæsar's death all Cisalpine Gaul had received the rights of citizenship (B.C. 49 to B.C. 47), two new ædiles had been created (*ædiles cereales qui frumento præessent*), and the prætors had been increased to ten, and subsequently to sixteen.

305. We pass over the wars which followed the death of Cæsar, during which the republicans were commanded by Cassius and Brutus. The latter, who imitated the first Brutus, wished to regenerate the republic which had been founded by his predecessor, as if, when the country, its inhabitants and its resources had all changed, the institutions could remain the same.

¹ *De offio.*, iii. 21.

306. We pass over the second triumvirate of Antony, Lepidus and Octavius, or, to express it more correctly, of Octavius Cæsar,¹ for Julius Cæsar had adopted him by his will and left him an inheritance, which he did not fail to acquire.

We pass over the terrible proscriptions which characterized this second triumvirate. But these proscriptions recall to our mind a man whom it would be unpardonable to overlook, who is to this day regarded as the greatest of all advocates, Cicero. His works are regarded as the most valuable sources, both of the history and law of Rome. While reading his letters to Atticus and Brutus, we feel ourselves taking part in the critical events to which he refers; we see before us the struggles of opposing factions; we realize the fears and sympathize with the hopes of the contending parties. We see the ancient consul, in the midst of anarchy and corruption,² meeting his opponents at one time with the arts of the politician, at another confounding them with his eloquence, supported by his clients and his friends, and the cities over whose interest he watches. His character,

¹ The adopted took the name of the adopter by adding to his own name the adjectival termination *ianus*. Octavius after his adoption should be called Octavianus Cæsar.

² From two quotations from these letters we are able to judge to what extent corruption existed in Rome. One of these refers to judgments, the other to magistracies. Cicero relates how Clodius cleared himself from the accusation brought against him: "In two days he (a trusted friend of Clodius) had concluded the affair through the instrumentality of a gladiator slave: he caused the judges to come to him, and corrupted them by promises, threats and gifts, and threw in as an additional inducement the offer of the honour of certain Roman ladies. The forum, deserted by honourable men, was usurped by slaves; and there were only twenty-five judges courageous enough to expose themselves to the peril of death rather than sacrifice the republic. There were thirty-one who listened to the prompting of rapacity rather than honour. 'Why,' said Catullus, addressing one of them, 'did you seek protection from us? Was it that you feared that the

money you received from Clodius would be stolen from you.'" *Epist. ad Att.*, lib. i. ep. 16.

The second quotation is as follows: "The consuls are steeped in infamy. C. Memmius has read to the senate an agreement they have made; here it is: 'In case the two consuls should nominate Memmius and his competitor for the next year, they on their part agree to pay 400,000 *sestertii* to the consuls, provided they furnish three augurs who shall state that they have seen the *lex curiata* passed in their favour, although none has been passed; and further, two consuls who shall swear to having signed the decree for the organization of their provinces, although there has been no decree.'" *Ibid.* lib. iv. ep. 18. What depravity! And at the same time what confusion! that it should be possible that one could be made to believe in a *lex curiata* for the investiture of office which had not been passed. It is true that this was a fictitious *lex curiata* brought about by the intervention of thirty lictors, and it is true that people could be made to believe in the existence of a decree which had never even been proposed.

always to examine their internal organization and local administration; this is especially so when the cities under consideration were situated in the provinces, inasmuch as the question of the concession of the rights of Roman citizenship, and the extent to which this concession extended, is involved in it.

311. Those colonies, like the allied towns, that were situated in Italy, enjoyed the rights of citizenship both private and public; but other colonies, founded in newly subjected countries, such as Africa, Asia, Spain, and the Gauls, were either Roman or Latin colonies, *i. e.* the latter enjoyed the *jus Latinitatis*. Under the name of *coloniæ militariæ*, a system of spoliation was introduced by which generals rewarded those who had assisted them in furthering the efforts of their ambition. Towns that resisted them were despoiled, and the plunder of the territory was divided among the soldiery. In this way Sylla, Julius Cæsar, and the triumvirs, recompensed their adherents. We see Virgil coming to Rome to implore Octavius to restore his little patrimony; we read in his eclogue the description of the unhappy shepherd flying with his little flock, his native pastures wrested from him by the heartless soldiery; we see him shortly after the favoured guest of Cæsar!

312. Notwithstanding minor differences, the different *municipia* were essentially governed in the same manner. Rome was the *summa respublica*; each *municipium a respublice municipalis*.¹

Some idea of this principle may be gained from certain fragmentary inscriptions which modern research has brought to light.

1. The *plebiscitum de Thermensibus*, which is written on a table of bronze, conferred the rights of a free town upon Thermessus in Pisidia. The date of this is about B.C. 72.²

2. The *Tabula Heracleensis*, so called from the fact of the

¹ The consul Scaurus addressing the grandfather of Cicero: "Utinam isto animo atque virtute in summâ republicâ nobiscum versari, quam in municipali maluisses!" Cicero, *De leg.*, lib. iii.

§ 16.

² "Legibus suis ita utunto itaque iis omnibus suis legibus Thermensibus majoribus Pisideis ut ei licito quod adversus hanc legem non fiat."

fragment having been discovered partly at Heraclea, near the gulph of Tarentum, in 1732, and partly in the same locality in 1735.¹

3. Some fragments of a *plebiscitum*, upon a bronze table, in two columns, discovered in 1760 amongst the ruins of Velleia.² The portion we possess treats of the organization and application of judiciary procedure in Cisalpine Gaul, whence it is called *Lex Galliæ Cisalpinæ*. The date of this *plebiscitum* is doubtless posterior to the enactment which conferred the *jus civitatis* on Gallia Cispadana, B.C. 49, and that which extended it to Gallia Transpadana, B.C. 47. But, in effect, the fragments we possess are too scanty to afford a general outline of municipal government, nor do they touch upon the most essential points of this system. A recent discovery made at Malaga of tables belonging to the Imperial period presents us with some more interesting details. These we shall consider in their proper place.

313. We have sufficient evidence of the existence of a *lex Julia municipalis*, by which Julius Cæsar, when dictator,

¹ Notwithstanding that these are but fragments, they contain matter of such diversity that it is doubtful whether they refer to one law or a code of laws.

These fragments appear to deal with three distinct subjects: 1. Declarations to be made at Rome to the consul, or in default to the *prætor urbanus* or to the *prætor peregrinus*; 2nd, certain rules concerning highways and the duties of the ædiles; 3rd, a collection of special provisions for the *municipia*, the *colonia*, the *præfectura*, the *fora* and the *conciliabula*, relating to the city magistracies, age, qualifications, disbursements and incapacity. Certain provisions which they contain would lead to the conviction that their promulgation must be ascribed to a period when the Italian towns enjoyed the rights of Roman citizenship, and consequently subsequent to the social war. M. Mazochi (1755) was of opinion that it might be regarded as a *plebiscitum* regulating the application of the *leges Julia et Plautia de civitate* (B.C. 90 and B.C. 89). M. de Haubold, in his *Chronology*, places it in or about B.C.

74. According to the conjecture of M. de Savigny, of whom we shall have occasion to make further mention, its date is B.C. 45. The two fragments, one of which is sometimes called *æ Britannicum*, because upon its discovery it was carried to England, the other *æ Neapolitanum*, are now at Naples. M. Blondeau has given their text in his *Recueil antéjustinien*, p. 81.

² The contents of this *plebiscitum* are confined to the *oppidum*, *municipium*, *colonia*, *præfectura*, *forum*, *vicum*, *conciliabulum*, *castellumve quæ in Gallia Cisalpina sunt*, and refer to *operis novi nunciatio*, *damnum infectum*, *pecunia certa credita*, *signata forma publica populi Romani*, and the *familie erciscundæ*. This *plebiscitum* is sometimes called the *lex Rubria*, but this must be an error, inasmuch as we find in one of its sections (article 20) the expression *Præfecture ex lege Rubria*, evidently referring to some other *plebiscitum*. The text of this *plebiscitum* will be found in M. Blondeau's *Recueil antéjustinien*, p. 77.

decreed certain general rules to be observed in the constitution and administration of *municipes*, at least in Italy. Cicero, in one of his *Epistolæ ad fam.*, refers to some of its provisions, and it is from this letter that we fix the date of the *lex Julia municipalis* at B.C. 41.¹ The text of this law is lost. Savigny, not without reason, is of opinion that the articles inscribed on the table of Heraclea concerning municipal regulations were taken from the *lex Julia municipalis*.

314. Passing from the condition of towns to that of persons, we observe analogous modifications:—

Civis.—This title, frequently granted to individuals, to the inhabitants of a given town, or even of a given locality, at this period was conferred upon the inhabitants of all Italy, including Cisalpine Gaul. Even kings, with the sanction of Rome, adopted it, preferring it to the style of king.

Latini, Italici, Coloni, Municipes.—From the termination of the social war the inhabitants of Latium and Italy enjoyed the rights of Roman citizenship, both private and public, and day by day became more closely identified with the Romans. The various distinctions between persons was confined to the provinces.

Socii.—Rome had its allies as well as and before its subject states. The Achæians had aided it in the overthrow of Macedonia, the king of Syracuse to drive the Carthaginians from Sicily, the king of Numidia in the destruction of Carthage; but all in their turn fell under the yoke they had assisted to place upon others. Their title of ally was either dropped altogether, or became a meaningless expression. The subject kings placed themselves under the protection of the senate, the consuls, or of a successful general. Their kingdoms and their thrones were divided, destroyed or taken at pleasure. Pompey and Cæsar regarded them as gifts at their disposal; and Antony placed at the feet of Cleopatra the kingdoms of Phœnicia,

¹ Cicero, *Ad familiares*, lib. vi. ep. 18: "Simul (ac) accepi a Seleuco tuo litteras, statim quæsi vi a Balbo per codicillos, quid esset in lege. Rescripsit eos qui facerent præconium vetari esse in decurionibus: qui fecissent non vetari.

Quare bono animo sint et tui et mei familiares: neque enim erat ferendum, quum qui hodie aruspiciam facerent in senatum Romæ legerentur, eos qui aliquando præconium fecissent, in municipiis decuriones esse non licere."

Cyprus and Judæa, which he had previously conferred upon Herod.

Subjecti.—This term includes the inhabitants of those provinces to which the concession before referred to had not been made. The soil was subject to the *vectigal*, or annual rent-charge, the person to tribute and to a multitude of other burdens, heaped upon them indirectly, as a consequence of their subjection to Rome, by the proconsuls, the lieutenants, the quæstors and the publicans, who were let loose among them, and who rapidly acquired wealth by the ever-increasing oppression of the despoiled peoples. The pictures drawn by Cicero, in his orations in support of the *lex Manilia* and in that against Verres, and by Cæsar in his writings, give a terrible view of these nefarious practices. The value of the respective provinces was estimated, and calculations made as to the amount that could be extorted from them in order that candidates for their government might ascertain to what extent it would serve their purpose to carry their bribery.

PUBLIC LAW (*Jus publicum*).

315. The three political bodies are still the *populus*, the senate and the plebeians. Between the two last there are the knights, who, having greatly increased in number and wealth, are frequently in conflict with the senators. But what had become of and what was the influence of these bodies during the civil wars? Amid the despotism of ambitious leaders, and the oppression of military rule, they followed the fortunes of parties and fell before the success of triumphant generals. They were approaching the period when they would have to recognize but one duty—to obey. So, in speaking of legislative, of executive and of judicial power, if the inquiry is made “What are the laws?”; it might be supposed that order and political principle still prevailed; but if this inquiry is followed by another, “What are the facts?”; the answer must be that all order and principle were overthrown.

316. *Legislative Power.*—This power is still lodged in the

comitia centuriata, the *comitia tributa*, and the senate; to these should be added certain magistrates, whose edicts were law, at least, during the term of their office.

During the period we have just considered, a remarkable revolution took place in the composition of the *comitia centuriata*. Of this fact we have indisputable documentary evidence, but what it was precisely, or the exact date at which it occurred, we do not know. As by the transformation to which the *populus* was subjected, the terms *Ramnenses*, *Tatienses* and *Luceres* had ceased to be applicable to any section of the *populus*, so by the fluctuations of wealth the standard imposed by Servius Tullius for the division of the classes became of no value. It is clear that figures, which represented the class wealth of former years, had lost all application to more modern institutions; and if we assume that changes had been made from time to time to suit the altered condition of things, we cannot suppose that those who had gradually extended the influence of the *comitia tributa* would be content with the continuance of a system in which the first class reckoned by the money standard should contain within it almost as many centuries, and consequently be almost worth as many votes, as all the others put together. Livy and Dionysius, after describing the system of Servius Tullius, both tell us that it had ceased to exist in their times. Dionysius says it had assumed a more plebeian form;¹ and we learn from Livy that the centuries were formed from or distributed amongst the thirty-five local tribes, the distinction, however, being preserved between the *seniores* and the *juniores*.² From the date of the Punic wars, changes had from time to time taken place in the designation of centuries of local tribes, whether *seniores* or *juniores*;³

¹ Dionysius, lib. iv. § 25.

² Livy, lib. i. § 43. "Nec mirari oportet hunc ordinem qui nunc est, post expletas quinta et triginta tribus, duplicato earum numero centuriis juniorum seniorumque, ad institutam ab Servio Tullio summam non convenire." (This is the principal document, and seems to indicate that each tribe formed two centuries, the one *seniores* the other *juniores*. It is however susceptible of

other interpretation.) Cicero, *In Verrem*, 2, lib. v. § 15.

³ Livy, 24, § 7: "Quum sors prerogativæ *Aniensium juniorum* exisset." Ibid. § 8. Preco, "*Aniensium juniorum* in suffragium revoca," 26, § 22; "Prærogativa *Feturia juniorum*," 31, § 26; *Galeria juniorum*, quæ sors prerogativa erat." (Vide supra, § 64, and note.)

hence the confusion we sometimes meet with in the Latin writers between tribes and centuries.¹

The points still doubtful are, 1st. Whether each local tribe was simply divided into two centuries, the one *seniores* the other *juniores*, making in all seventy centuries; or whether, preserving in each local tribe a distribution into five classes, they formed, following these classes, in each tribe five centuries *seniorum*, and five centuries *juniorum*, making in all three hundred and fifty? 2nd. Were the twelve centuries of knights maintained? 3rd. Did the *sex suffragia*, i.e. the six centuries of ancient *Ramnenses*, *Tatienses* and *Luceres*, also exist? It would appear from the evidence we possess, that the division by classes in the local tribes and the twelve centuries of knights remained.²

317. The most important change that had taken place as to matters of form was the adoption of secret voting.³ Each citizen received two voting tablets, the one for the affirmative, having the letters U R. (*uti rogas*); the other for the negative, with an A (*antiquo*) written upon it. The barriers within which the citizens, in tribes or centuries, were packed (*septa, ovilia*); the use of narrow bridges over which they passed one by one; the deep wicker basket into which each as he passed dropped his vote; the scrutiny and proclamation of the result; and, above all, the manoeuvres practised to secure and even to purchase votes, when it was the question of an

¹ Cicero, *Pro Plancio*, §§ 20, 22; *De lege agraria*, 2, § 2.

² Livy, 43, § 16: "Quum ex duodecim centuriis equitum octo censorem condemnassent, multæque aliæ primæ classis . . . &c." (Case of Claudius, colleague of T. Gracchus.)

³ Cicero, *De legibus*, 3, §§ 15, 16, 17, discusses the relative advantages of public audible voting and secret voting by means of *tabellæ*, and from his remarks upon the supporters of the ballot, his strong aversion to it is apparent. The *leges* upon this subject enumerated by him, and styled *leges tabellariæ*, are four in number: the *lex Gabinia, tabellaria*, B.C. 140, for

the appointment of magistrates; the *lex Cassia, tabellaria*, B.C. 138, affecting the judgments in criminal prosecutions, high treason excepted (*perduellionis*); a law of Papirius Cælius Calvus, B.C. 108, including high treason; and finally the law of Papirius Carbo, B.C. 92, as to the votes for the passing of laws. It is however evident from the same passages of Cicero that the people were of opinion that the ballot was the guarantee of their liberty in voting, to which Cicero assents, "*Habeat sane populus tabellam, quasi vindicem libertatis*," provided that they acted conscientiously.

election, the decision in a criminal case, or the enacting of a law, are worthy of consideration, and are in many respects not wanting in analogy with the practices of our own times.

318. The sources of legislation at this period are, as to written law, *leges*, which had become more and more rare; *plebiscita*, which had been multiplied and almost superseded the former; *senatûs-consulta*, which commence, though at first rarely, to deal with points of private law, and which were destined in their turn to take the place of both *leges* and *plebiscita*.

As to the *lex non scripta*, we have—1. The edicts of the magistrates,¹ certain provisions of which, transmitted from year to year, and confirmed by usage, became the customary law, and supplemented the civil law, leading it in many cases from the austerity of its first principles to conformity with those of natural justice; 2. The *responsa prudentum*, which, received by the litigants, adopted by the judges, and repeated in analogous cases, formed a second branch of the *lex non scripta*, and introduced certain principles, maxims and modes of procedure. Both of these were the result of the incessant efforts of science, philosophy and civilization. In the words of Cicero, we can recapitulate the sources of Roman law thus:—“*Ut si quis jus civile dicat id esse quod in legibus, senatûs-consultis, rebus judicatis, juris peritorum auctoritate, edictis magistratum, more, æquitate consistat.*”²

319. Executive Power—Electoral Power.—In principle these two continued to remain in the same hands: the elections belonged to the *populus* and to the plebeians; administration to the senate and to certain magistrates; the command of armies

¹ The edicts of the magistrates are ranked as *lex non scripta*, notwithstanding the fact that they were written in *albo*, *ubi de plano recte legi possit*; because at the period at which we have arrived the edict was not, properly speaking, a law; it was only obligatory for one year, it formed a part of the executive administration of the magistrate who promulgated it and ended

with his functions (*lex annua*). They therefore differed widely from laws regularly enacted, and such only of these edicts could be regarded as forming a part of the customary law as had by custom been perpetuated and were considered by the prætors as continuously binding.

² Cicero, *Top.*, 5.

to the consuls, or, by a *lex curiata*, to proconsuls and pro-prætors.¹ In fact, however, money, intrigue or force carried the elections. Each candidate brought to Rome his satellites, his soldiers, and even entire towns that he had taken under his protection. Certain citizens, by an illegal association, domineered over all the political bodies, and in a certain manner divided the entire empire between themselves; governors of provinces rendered themselves independent of the senate; generals maintained themselves at the head of their armies; consuls and dictators ceased to be limited to the ancient term of office.²

320. The *lex Atinia*, B.C. 130, conferred senatorial dignity upon the plebeian tribunes, who thus were admitted to the senate. Long before this, however, though not being senators, they had arrogated to themselves the right to convoke the senate (*senatûs habendi*);³ their right and practice of *intercessio* had been established and largely extended.⁴ In certain cases, however, the tribunes, as well as the other magistrates, had by law been prohibited from the exercise of this power (*ne quis posset intercedere*); and the senate, about this period, drew up the following formula, *Qui impedierit, prohibuerit, eum Senatum existimare contra rempublicam fecisse*.⁵ Sylla, B.C. 82, stripped them of all the advantages they had gained, and reduced them to their primitive *auxilium*, but under Aurelius Cotta, B.C. 76, and especially under Pompey, B.C. 71, they recovered all that had been taken from them by Sylla.⁶

¹ Military power could only be conferred upon a proconsul or a pro-prætor by a special law passed by the curies.

² Prior to Sylla no dictator had been appointed for nearly one hundred years. The senate in cases of danger had contented itself with increasing the power of the consuls for the time being, using the following formula: "*Videant, or Caveant consules ne quid detrimenti respublica capiat.*"

³ Aul. Gell. lib. xiv. ch. 8: "Namque et tribunis, inquit (Atteius Capito), plebis senatûs habendi jus erat, quamquam senatores non essent, ante Atinium plebiscitum."

⁴ See Aul. Gell. lib. vii. ch. 19.

⁵ Cicero, *De provinciis consular.*, § 8; *Ad familiar.*, lib. viii. ep. 8.

⁶ Cicero, *De leg.*, lib. iii. § 9: "Vehementer Sullam probo, qui tribunis plebis, sua lege, injuriæ faciendæ potestatem ademerit, auxilii ferendi reliquerit." And as regards Pompey: "De tribunitia potestate taceo: nec enim reprehendere libet, nec laudare possum." J. Cæsar, *De bello civili*, lib. i. § 7: "Sullam, nudata omnibus rebus tribunitia potestate, tamen intercessionem liberam reliquisse: Pompeium, qui amissam restituere videatur, dona etiam quæ ante habuerit ademisse."

321. The newly-created magistrates were the *Tribuni Ærarii*, *Triumviri Monitales*, *Triumviri Capitales*, *Quatuorviri Viarum*, *Quinqueviri*, the two *Ædiles Cereales*, *Proconsul*, *Legati*, and the *Quæstores Provinciæ*.

322. Judicial Power.—The prætors, now sixteen in number, the centumvirs, the decemvirs, the *juges-jurés* or arbitrators, and the recuperators, co-operated in the administration of justice, the prætors, as magistrates, having a jurisdiction; the others simply as judges selected in each individual case; the *ædiles* had also a tribunal and a jurisdiction.

323. Criminal Matters.—The establishment of *quæstiones perpetuæ*, it is true, took out of the hands of the people a considerable portion of their power in criminal matters; but, on the other hand, it removed the vague and arbitrary character of the law, at least so far as those crimes were concerned for which *quæstiones* had been instituted. As to these, the law, the tribunal and the mode of procedure were fixed. No one could be brought before one of these permanent tribunals except by virtue of a *lex*, a *plebiscitum* or a *senatûs-consultum* approved by the tribunes, these enactments at the same time permitting and regulating the mode of execution. Then came the appointment of the judges; these were taken from a table prepared once a year by the prætor, and by him affixed to the Forum. The mode of selecting the judges as well as the number necessary was determined for each delict. As a general rule the accuser made the selection: he drew up a list containing double the number necessary for the *quæstio*; the accused then struck out one-half of the names. In certain cases the judges were determined by lot, the accuser and the accused having each the right to reject those that they disapproved.¹ The right to be inscribed in the list from which the judges were to be selected was at one time confined to the senators, at another to the knights, and at a third divided between the

¹ Cicero, *Ad Attic.*, 1, 16, §§ 3, 4 and 5.

two orders, and at the period to which we now allude was extended to other classes of the citizens.¹ *Cognitio extraordinaria* was the term applied to any investigation made by the senate, the magistrates or the *quæitores* that did not fall within the scope of a *quæstio perpetua*.

324. Civil Matters.—The *actiones legis* had been almost entirely suppressed, their use being confined to cases falling within the cognizance of the centumviri. The formula system, which had replaced the *actiones legis*, had ingeniously regulated the application of a jury system to civil cases, retaining the ancient distinction between *jurisdictio* and *judicium*. The prætors were the principal magistrates invested with the *jurisdictio*. The *unus judex*, the *arbiter* or the *recuperatores* had for each case the *judicium*. The judges were taken from the annual list. The tribunal of the centumvirs and of the decemvirs, the origin and province of which are not clearly known to us, had gradually been falling into decay since the adoption of the formula system. In civil matters the term *cognitio extraordinaria* or *judicia extraordinaria* was applied to those cases where the magistrate himself determined the suit without sending it to a *judex*, *arbiter* or *recuperatores*.

325. In the provinces the proconsul, the proprætor and their lieutenant, as magistrates invested with jurisdiction, and the recuperators, as *juges-jurés*, selected in a manner analogous to that in vogue in the case of the *juges-jurés* at Rome, administered justice both civil and criminal. Sometimes, however, the governor left to certain towns, especially in connection with civil matters, the native tribunals.

326. Public Revenue and Expenditure.—Up to the time of Servius Tullius taxation consisted of a capitation arbitrarily fixed, without regard to the means of the individual. After the institution of the census, and the division into classes made

¹ It must be remarked that any citizen who was accused of a capital offence was at liberty to go into voluntary exile,

in which case his goods alone were confiscated.

by Servius Tullius, this arbitrary tax was replaced as to those inscribed in the five classes by one proportioned to the fortune, the *proletarii* and the *capite censi* being exempted altogether. Those not enrolled in a tribe, and consequently not in a census, but classed amongst the *ærarîi*, were, as heretofore, subject to a poll tax arbitrarily fixed by the censor, and were bound to provide for the pay of the soldiery and the maintenance of the cavalry (*æs militare, æs hordiarium*). Widows and unmarried women, orphan minors, and consequently heads of families, who were unable to take military service, were subject to this capitation, as were also the *cælebes*. When Rome, by its victories, had amassed the wealth of other nations, these imposts for a long time disappeared, and in the year B.C. 168, after the conquest of Macedonia, the citizens were freed from all direct contribution.¹ From this time the public revenue was derived from the rents of the public lands, the plunder of the enemy, the tribute paid by the provinces, the profits arising from mines, and the monopoly of salt, which belonged exclusively to the state, certain port dues, and the fine of one-twentieth of the value upon the sale or enfranchisement of slaves. Public disbursements met the support of the troops, their pay, the expenses of distant wars, the construction and maintenance of public buildings and monuments, highways, aqueducts and the distribution gratuitously made of grain to certain portions of the community. When we picture these citizens in the public places, stretching forth their hands to receive their share of the public grain as a charity, when we see them streaming into the circus to enjoy a gratuitous spectacle, it is not difficult to realize the force of the words which represent all these debased Romans as wanting nothing from their leaders but bread and amusement. Magistrates were not at this time salaried, but the proconsuls, the proprætors and their lieutenants had learned how to enrich themselves by their office, if not at the expense of the state, at least at that of the provinces.

¹ Cicero, *De officiis*, lib. ii. § 22: tantum in ærarium pecuniæ inveni-
 "Omni Macedonum gaza, quæ fuit maxi- ut unius imperatoris præda fuit
 ma, potitus est Paullus (Æmilius): attulerit tributorum."

JUS SACRUM.

327. The *jus sacrum*, although it no longer had the influence it formerly enjoyed over the *jus civile*, was nevertheless still connected with the administration of the state. The augurs, whose college since the time of Sylla had been composed of fifteen members, still continued to consult the auspices, and we find Cicero aspiring to the honour of becoming a member of it. At this period the right of nomination to the college, as also to that of the pontiffs, was vested in the *comitia*.

With the conquests of Rome the number of its deities was multiplied, and at this period the divinities of all the nations it had conquered were included in its theological system. The practice was for a Roman general, when he had taken and destroyed a town, to entreat its tutelary deities to abandon the place and to go to Rome, where altars and a form of worship were provided for them. Scipio did not fail to address this prayer to the gods of Carthage, and the formula, which was probably the same in all cases, has been preserved. "If there is a god or a goddess who protects the Carthaginians and their city, and thou, great god, who hast taken under thy protection this city and its people! I pray, I entreat, I conjure you to abandon the people and the city, to quit their dwellings, their temples, their worship, their walls; to withdraw from them; to cast among them fright, terror, oblivion. Accompany me to Rome, make our dwellings, our temples, our worship, our city, thine own; take the Roman people into thy protection, take my soldiers, take me; grant us knowledge and intelligence. If thou wilt grant my prayer, I here vow to dedicate to thee temples and sacred games!"

JUS PRIVATUM.

328. The development of civil law follows close upon the increase of wealth, the expansion of territory and improvement in manners; and it was impossible that Rome, when it had expanded into an empire, had accumulated wealth and advanced in civilization, should have existed under the same system of laws as suited it in the early days, when its territory was com-

paratively small, its people poor and their manners rude. We now find the system of the civil law of the time of the republic, marked as it was with the hard lines of austere and imperious power, yielding to principles more in accordance with the requirements of civilized human nature. The interchange of ideas between the Roman and foreign nations caused the introduction of laws of more general application, but there was a kind of inconsistency, an incongruity within the system itself, which becomes more and more marked as time goes on. Whilst the edicts of the prætors, the *responsa prudentum* and the works of the jurists were incessantly leaning towards the principles of natural equity, the primitive system of law, founded on a basis in which those principles were entirely disregarded, was still retained. And it presents the curious anomaly of principles most rigorous in their character and extraordinary in their nature, amalgamated with words, distinctions and hypotheses which served as means to evade them.

329. Persons.—The various powers exercised over slaves and children had assumed the name of *potestas*; that over women, *manus*; that over free men acquired by mancipation, *mancipium*. These powers were, however, beginning to be considerably modified. The *potestas* over slaves indeed remained the same, although their number and their actual position were very much changed. The paternal power (*patria potestas*) had been very much weakened. The marital power (*manus*) had almost entirely disappeared. Of the three ways of acquiring it, the *coemptio* was now seldom used; *confarreatio* was confined to the pontifical class; and usage (*usus*) appears to have been no longer practised. The power over freemen bought or given away as property, *mancipium*, hardly existed except as a fiction; and in cases where this power was still exercised it was considerably modified. *Gentilitas*, in consequence of the disappearance of clients, of the extinction of old families, and of the incessant addition of superstrata of population, had already become very rare. Blood relationship, *cognatio*, was beginning under the prætors to have some effects and to give rise to some bonds and obligations. The perpetual tutelage over women

was almost abolished; the tutor interfering only in the most important acts, as a matter of form and without having the power of refusing his authorization, unless, indeed, he happened to be one of the agnates; but women had found the means, by a fictitious sale,¹ of escaping the tutelage of these agnates.

330. Things and Property.—The term *mancipium*, formerly given to property at the period when violence was the means of acquiring it and the lance was its symbol, had been modified. Property was now, as it were, centred in each family; the chief alone enjoying an individual personality, alone possessed all rights over it; but the children under his power, who could hold nothing individually, were all, as it were, co-proprietors with him. Property was considered as something belonging to the *dominus* and his family *in domo*; whence its new name *dominium*. This however was no longer the sole form of property. Parallel with it the law had brought into existence a new form. *Res* were either *in dominio* or *in bonis*. The *dominium* was Roman ownership—*dominium ex jure Quiritium*. *In bonis* was the new form introduced by the prætor, but for which no exact term exists. This was a species of natural property, called by the commentators *dominium bonitarium*, an expression which is not in itself Roman. This division of property exists side by side with the division into *res Mancipi* and *res nec Mancipi*. The classification of things under the head *res Mancipi*, as has been already stated, was unalterable.

331. Wills.—Interpretation and custom had much restricted the absolute rights of the father of a family. If he should wish to disinherit his children, he must now formally declare his wish, which was called *exheredatio*, otherwise his will was in some cases altogether void, or, in others, void so far as to pre-

¹ Women, by a simulated sale, *per æs et libram (coemptio)*, feigned to pass under the power, *in manu*, of the purchaser. And as they then got out of their family, as we have shown when speaking of the woman *in manu con-*

venta, §§ 121 and 125, the agnates lost their right, and their tutelage ceased. This is a case in which they used the procedure of the ancient law to evade the law.

vent the children from participating in the inheritance. It was also necessary that he should be actuated by a just motive, otherwise his will might be impeached before the centumvirs under the fiction of insanity, as being contrary to the dictates of nature, *testamentum inofficiosum*.¹

332. Successions.—The civil bonds, *agnatio* and *gentilitas*, were now no longer the only ones that gave rights of succession. The prætor, whose duty it was, in order that the law might be carried out, to deliver up to the heir the possession of the property of the deceased, contemplated making that possession a kind of prætorian inheritance, *bonorum possessio*, which was often given to persons to whom the inheritance was refused by the civil law.²

Thus he granted the possession of the property to the emancipated child; sometimes to the adopted child, although no longer in the family; so, when there was neither heir proper nor agnate, instead of giving possession to the public treasury, he delivered it up to the nearest cognate.

333. Obligations and Contracts.—The number of contracts, or binding conventions, was increased. The *nexum*, by which a man bound himself, had been transformed and had given birth to other contracts. It was replaced by the four civil contracts made *re*, that is to say, by the delivery of the thing; *mutuum*, that is to say, the loan of things consumed in the use, termed *fungibiles*, and which were to be returned in kind; *commodatum*, the loan of a thing to be used and returned according

¹ "Hoc colore quasi non sanæ mentis fuerint cum testamentum ordinarent," say the *Institutes*, lib. ii. tit. 18, pr. This affords an illustration of a case in which one ground of nullity, which did not exist under the ancient law, is assimilated to a ground of nullity which did actually exist. In the same way the necessity of *exheredatio* is derived by the jurists from the civil-law principle of the co-ownership of a family; the children being, as it were, co-proprietors of the family patrimony, the head of the family could only deprive

them of their rights by a formal declaration of his intention so to do.

² This is an instance where, with the help of one word, they changed the ancient law, whilst appearing to respect it. They did not give to the child the inheritance, or the title of *heir*, because the civil law refused them to him; but they gave him the possession of the property, *bonorum possessio*, the title of *possessor*, which, under the prætorian system, came to nearly the same thing in other words.

to the terms of the agreement; *depositum*, a simple bailment; *pignus*, a bailment or loan by way of pledge.

The *stipulatio*, which was the first offshoot from the *nexum*—the ancient Quiritarian formula expressed by the terms *spondes ? spondeo*, which were exclusively applicable to citizens—was extended and made applicable to all by the substitution of the terms “*promittis ? promitto*,” and other similar expressions.

To this first derivative of the *nexum* must be added a second, the contract *litteris*, or the *expensilatio*, which, exclusively appropriated to the citizens in certain forms, had also been, with the help of certain modifications, extended to foreigners. Lastly, the civil law had admitted four contracts under the *jus gentium*, depending entirely on the exercise of the will, and in which obligations are produced by consent alone: the sale, *emptio venditio*; hiring, *locatio conductio*; the mandate, *mandatum*; and partnership, *societas*. The prætor, moreover, had recognized as obligatory some of those conventions, which, according to civil law, produced no obligation nor action when they were not accompanied by stipulations. Those conventions, not obligatory, named in general pacts, *pacta*, although not conferring an *actio*, received, however, from the jurists and prætorian influence, certain effects which were deemed incidental to natural obligations; and, having received prætorian sanction, were called and recognized as prætorian pacts. In the same way the jurists, under prætorian influence, in addition to the acts classified as delicts by the ancient civil law, recognized others, such as deceit, violence, taking, as also giving rise to obligations. So that, in brief, they had begun now to distinguish three classes of obligations: the civil, the prætorian and the natural.

334. *Actiones*.—The procedure in the *actiones legis*, abolished by the *lex Æbutia* and by the two *leges Juliae*, was replaced by the formulary system. The *actiones legis*, however, were still preserved in two cases, one of which was the case where the action lay before the centumvirs. The word *actio* had notably changed its signification. It no longer designated

a *modus operandi*. Each right gave rise to its appropriate action.

The *actio* was the right to enforce a claim, conceded in general by the law, either civil or prætorian, and obtained chiefly from the prætor in each individual case. In many cases where the civil law gave no action, although equity or expediency seemed to require it, the prætor permitted actions called *honorariæ actiones*: and universally in cases where the strict law gave actions contrary to equitable principles, the prætor granted the means of repelling them, which were called *exceptiones*, and which were in fact simply restrictions engrafted by him in the formula, regulating and placing restrictions upon the judge as to the decision at which he should arrive.¹

335. This is the date which has generally been considered to be the commencement of the most flourishing epoch of Roman law. While, on the other hand, if we take the words "Roman law" to signify "Quiritarian," or primitive law, we must trace from this epoch the commencement of its decay. And it is apparent at once, from the rapid sketch we have given, that the simple and rude legal system of the earlier days of Rome had disappeared, although the main principles of this system were still recognized. Every day witnessed the introduction of some fresh modification, which was rendered necessary by the advance of civilization and ever-growing improvement in the manners of the people. Law had begun to develop into a science, closely bound up with the principles of natural equity; but it is true that it had one great defect, in that it contained two opposing elements. There were the old fundamental principles of the early system co-existing with the decisions of more recent times and the new institutions to which they were giving rise. Thus the civil law was placed in antagonism with the prætorian law, and the principles contained

¹ This is another instance of an ingenious method of correcting the ancient law. When an action was contrary to natural equity, the prætor did not declare that he abolished it, nor did he prohibit it from taking place.

The civil law gave it, and he would not allow himself to repudiate that law, but he in fact rendered it useless by creating an *exceptio*, which was a *modus* of defence against the attack (*actio*).

in the *responsa prudentum*; and hence came those ingenious and subtle subterfuges designed to apparently reconcile real inconsistencies.

It must be confessed, however, that when once we admit the existence of these contradictory elements, it is impossible not to recognize the ingenuity, the ability and the judgment which was evinced by the jurists and the prætors in harmonizing them.

In fact, if we regard the question on general principles, apart altogether from Rome and Roman history, and look at the system only as it bears upon the common instincts of human nature, we cannot but admit that the changes alluded to were symptoms of progress and improvement, and the worthy precursors of a vast system of scientific jurisprudence which was destined one day to influence the whole civilized world. If we regard the question, on the other hand, from a historical point of view, estimating the laws by the manner in which they affected the people who made them for themselves, and taking into account also the peculiar character of that people and of their institutions, we are forced to admit, that it was the rigid cast-iron legal system which had made the republic what it was, and that, when one fell to pieces, the other disappeared with it.

MANNERS AND CUSTOMS.

336. It is obvious that, when the political institutions and the civil law of a state undergo great modifications, the national habits, manners and mode of thought which gave rise to those institutions and laws must have also undergone a great change. It is scarcely necessary, however, to describe the habits, manners and modes of thought which succeeded. But there are two customs in particular which deserve attention.¹ Men of consular dig-

¹ It may not, perhaps, be useless to give an idea of the way in which the Romans designated persons: 1st. The pre-name, *prænomen*, served to distinguish the various members of the same family; the Roman language did not contain a great number of them, and

therefore they were generally written only with the initial letter. The eldest son took that of the father; the daughters in general did not bear any; they were distinguished in the family by the epithets of *major*, *minor*, *prima*, *secunda*, *tertia*, and so on. 2nd. The

nity, the first magistrates of the republic, used to appear before the judges to plead the causes of the citizens in public, their presence having considerable influence in the determination of the cause, particularly in matters of a civil or criminal character affecting the state. The other practice had no connection with the law, but it was not on that account less remarkable; it was the astonishing facility with which the Romans of these later times used to commit suicide. On the defeat of a party, the chiefs would either put an end to their lives with their own swords, or solicit a friend to destroy them. Thus perished Scipio, Cato, Cassius, Brutus, Antony—to cite only the most illustrious names. Montesquieu, in his usual facile style, suggests several reasons for the practice; it appears to me that there is one sufficient reason to account for it, and it is this. In the earlier days, when the consuls fought for the republic, if they were vanquished, the republic still lived, and they lived with it. But when leaders fought only for a party, if they failed, they failed altogether, and there was nothing left to them; their party was annihilated, and they were crushed with

name, *nomen*, which came after the former, belonged to the whole race. It was applied to the daughters in the feminine gender. 3rd. The surname, *cognomen*, was a kind of epithet, given on the occasion of some great deed, or in celebration of some brilliant sally of wit, or in consequence of some peculiar charm of person, or else some deformity. Sometimes the *cognomen* remained in the family of the man who had borne it first, and in such cases, in addition to that general surname, the various members could bear a second surname personal and peculiar to them; this second surname is called by some authors *agnomen*. Thus in the designation of the great pontiff App. Claudius Cæcus, we find the *prænomen* Appius, the *nomen* Claudius, and the *cognomen* Cæcus. In the family of the Scipios, we have *P. Cornelius Scipio Africanus*, *L. Cornelius Scipio Asiaticus*; here *Publicus* and *Lucius* are the *prænomina* of the two brothers, *Cornelius* the *nomen* of the race, *Scipio* the general *cognomen* of the family, *Africanus*

and *Asiaticus* the particular surname of each of the brothers.

The adopted took the name of the adopter, and preserved that of his former family, transformed into an adjective, thus; *Cæsar Augustus* was styled *Octavianus*, because being the son of C. Octavius, he had been adopted by the will of J. Cæsar.

Married women added to the name of their family that of their husband, in the genitive case, as a mark of their dependance. Thus *Calpurnia Antistii*, *Calpurnia* wife of *Antistius*, the lady who swallowed hot charcoal when her husband had fallen a victim of the party of Marius.

Slaves never had more than one name, as *Stichus*, *Geta*, *Darus*; when once they were freed, they joined to it the *prænomen* and the *nomen* of their patron. In this way Terence, whose name as a slave we do not know, took, upon gaining his freedom, that of his master, *P. Terentius*, which he has transmitted to posterity.

it. And, we may observe, that this practice came in with the civil wars and the proscriptions, and those who died by their own hand were in reality men condemned to death, who killed themselves to escape an ignominious end.¹ It was necessity that made suicide a point of honour.

¹ There was no hope of escape for these men, for the power of their conquerors extended over the whole of the then known world; and if they sought

an asylum anywhere, it would only be to meet the fate of Pompey and his son Sextus.

THE THIRD EPOCH.

THE EMPERORS.

I.—FROM THE ESTABLISHMENT OF THE EMPIRE TO CONSTANTINE.

B.C. 31. CÆSAR AUGUSTUS (*Cæsar Octavianus, Augustus cognomine*).

387. AFTER the battle of Actium and the triumphs which followed, Cæsar Octavius, instead of proclaiming at once that the republic was overthrown, and that one man would henceforth rule over the empire, proceeded step by step to make his way to supreme power. "Sylla, a man of violence," says Montesquieu, "led the Romans by violence to liberty; Augustus, a crafty tyrant, led them gently to servitude." He gained over the soldiers by liberality, his enemies by clemency, and the Romans generally by extravagance and by gratifying their love for public spectacles. The stormy period of the civil wars was followed by a period of tranquillity and the revival of the fine arts; and it was in the midst of a crowd of rhetoricians, poets and historians that the power of Augustus increased day by day. It seemed as if both the senate and the people riveted their own chains more firmly each succeeding year. The former conferred on Octavius the title of "Imperator" in perpetuity,¹ confirmed all his acts, and swore obedience to him. This was in B.C. 29. Two years later it decorated him with the title of

¹ This was an ancient and honourable military title, derived from the Oscan language, and is still to be seen on the old Oscan coins, spelt according to the early system of writing, now obsolete, *em̄bratnr*. It was given by the Roman soldiers by acclamation to a victorious general in the transport of

joy with which they greeted him on a successful field. More than one person could bear the title at the same time, and it conferred no particular authority. (Tac., *Ann.*, 3, § 74.) It afterwards came to designate the supreme chief ruler of the state.

“Father of his country” and of “Augustus,” a term heretofore confined to sacred things. It confirmed the supreme power in his hands for ten years, and made over to him, as his own, the finest and most important provinces of the empire, *provinciae Cæsaris*, reserving for the people, as *provinciae populi*, the provinces which were the most quiet and submissive. This was in B.C. 27. Four years later the people conferred on Augustus the power of the tribunes in perpetuity, as also in perpetuity the proconsular power, B.C. 23. Four years later the consular power in perpetuity. Two years later, B.C. 17, the senate renewed the ten years’ term of absolute power, and four years after that it gave him the title of Pontifex Maximus, formerly enjoyed by the kings, and entailing the duty of presiding over the public worship, B.C. 13. It was thus that, without appearing to subvert the magistracies of the republic, Augustus annulled them by accumulating their functions in his own hands, and by thus grasping the whole of them he acquired absolute sovereignty.

338. There were still, however, consuls,¹ proconsuls, prætors, tribunes, who were appointed as colleagues to the emperor, to whom they were immediately subordinate. Those candidates who were nominated by the emperor were certain of election. Augustus did not fail to keep these offices in his family, conferring them on his nephews, sons-in-law and grandsons even when they were scarcely adults. But to complete the new system then in its infancy, it was necessary that the new dignitaries should be appointed by the emperor, be attached to his fortunes and dependant on him; and therefore we find several new offices springing up under Augustus, which were destined to be more or less developed under his successors,—the *legati Cæsaris*, the *procuratores Cæsaris*, the *præfectus urbi*, the *præfectus prætorius*, the *quæstores candidati principis*, the *præfectus annonarum* and the *præfectus vigilum*.

¹ As the consuls were in fact deprived of the general direction of the state, which the emperor had taken on himself, a portion of the jurisdiction which

they had enjoyed in former times was restored to them, and they shared with the prætor some functions of criminal jurisdiction.

SECTION LVIII.

LIEUTENANTS OF THE EMPEROR (*Legati Cæsaris*).

339. The provinces, as we have already shown, were divided between the people and the emperor. That portion of them which was considered as more especially belonging to the people (*provinciae populi*) was governed, as formerly, by the consuls and by the prætors after leaving their office. The revenue derived from them, and paid into the public treasury, was called *stipendium*. The others were the property of Cæsar (*provinciae Cæsaris*), and the revenue derived from them was called *tributum*.¹ They were administered by officers appointed by the prince, *legati Cæsaris*. There were, however, some distinctions between the privileges and powers enjoyed and exercised by the proconsuls and by the *legati Cæsaris*, the principal of which was, that as the emperor was the commandant of the army, and as he had reserved to himself the provinces most liable to disturbance, or the frontier provinces in which, or from which, it was necessary to make war, his *legati* were military officers wearing the military insignia and costume, and commanding soldiers; whereas the proconsuls of the senate were only civil magistrates without military command. The emperor had the army under his control. But each of these functionaries was styled *præses provinciae*.²



SECTION LIX.

PROCURATORS OF THE EMPEROR (*Procuratores Cæsaris*).

340. The treasury, like the provinces, was divided into two parts—one for the public, *ærarium*, the other for the prince, *fiscus*.

¹ Gai., *Instit.*, 2, § 21.

² Dig. 1, 16, *De officio proconsulis et legati*; ib. 18, *De officio præsidis*. The government of Egypt ranked above that of all the other imperial provinces; the lieutenant there had a particular title, *præfectus augustalis*. They used

also to depute into that province a functionary whose duty it was to administer justice, in concert with the president; he bore the name of *juridicus per Egyptum, juridicus Alexandriae*. Dig. 1, 17, *De officio præfecti augustalis*; ib. 20, *De officio juridici*.

In order to secure his own interests and to manage the property which constituted his peculiar domain, Augustus appointed to the provinces a steward or agent—a functionary who filled somewhat the same position as the *quæstors*, only the latter were not employed in the imperial provinces. These officials, *procuratores*, ought not to be classed as magistrates, for they were merely the agents, so to speak, of *Cæsar*; and, accordingly, they were at first selected solely from the freedmen. But under a system where the emperor is all in all, his agents are important personages, and the *procuratores Cæsaris* acquired afterwards an important administrative position, were empowered to adjudicate on all questions connected with the *fiscus*, and sometimes even replaced the *præses provinciæ*.¹



SECTION LX.

THE PRÆFECT OF THE CITY (*Præfectus urbi*).

341. From the most remote period of Roman history, we frequently meet with mention of the *præfectus urbi*. It was the duty of this functionary when the king, and afterwards the consuls, went away at the head of the army, to remain in Rome, to protect the city and preside over the administration.

Augustus made this office permanent. The *præfectus urbi* was, in concert with the consuls, to try certain criminals in extraordinary cases; he exercised also some of the functions formerly belonging to the *ædiles curules*. The increase of his powers kept pace with those of the emperor, and we shall find him at last invested with almost entire criminal jurisdiction, and superior to the prætors. There was, however, no præfect except in Rome, and his powers were restricted to the narrow limits of the urban jurisdiction, and did not extend beyond a radius of a hundred miles around the city.²

¹ Dig. 1, 19, *De officio procuratoris Cæsaris*, vel rationalis.

² Dig. 1, 12, *De officio præfecti urbi*.



SECTION LXI.

PRÆTORIAN PRÆFECTS (*Præfeti Prætorio*).

342. Augustus raised for himself a body of troops called prætorian guards, who were soldiers exclusively attached to the person of the sovereign. At their head were two knights, styled prætorian præfects, in imitation, so says a fragment of the Digest, of the ancient dictators, who were in the habit of appointing a *magister equitum*. The number of these præfects varied at different times. Their status and office was at first purely military, but under succeeding emperors they acquired in addition civil powers, and eventually retained these alone. The illustrious jurists, who at a later period held this office, shed that lustre upon it for which it is so remarkable.¹ Historians derive them from the *celerēs*, or guards of Romulus.



SECTION LXII.

QUÆSTORES CANDIDATI PRINCIPIS.

343. These were functionaries differing from the *quæstors* charged with the administration of the treasury, whether in Rome or in the provinces. They were created by Augustus for the purpose of reading aloud in the senate the despatches which the emperor addressed to that body, and all the transactions which he thought proper to communicate to it.²



SECTION LXIII.

THE PRÆFECTUS ANNONARUM.

344. The title of this official is sufficient to indicate his functions as connected with the supply of provisions; he was subordinate to the *præfectus urbi*.

¹ Dig. 1, 11, *De officio præfecti prætorio*.

² Dig. 1, 13, *De officio quæstoris*.



SECTION LXIV.

PREFECT OF THE NIGHT GUARDS (*Præfectus vigilum*).

345. The duty of securing public tranquillity during the night had formerly been entrusted to five magistrates, called the *quinque viri*, to whom we have already alluded.¹ Augustus told off for that duty seven cohorts, each commanded by its tribune, and distributed about the city, so that each had two districts to protect, which shows that Rome was divided into fourteen districts. To superintend all those cohorts, a special magistrate, *præfectus vigilum*, was created, whose business it was to make nocturnal rounds, to prescribe to the inhabitants all the precautions necessary to prevent fires, and to punish breaches of his law. In addition to which, he exercised jurisdiction over, and took cognizance of, certain offences connected with the public safety, such as robberies with housebreaking, and thefts committed in the baths. When, however, the crime was such as to be amenable to a heavy penalty, the *præfectus vigilum* was required to send the case before the *præfectus urbi*.²

346. All these imperial offices, as they came into existence, superseded by degrees the republican magistracies. Several of the latter disappeared entirely; some remained only in name; a few, such as that of the prætors, partially retained their importance, and the absolute power of the emperor was erected amid new institutions which it had itself created, and which contributed to its support. This remarkable change in the administration corresponds with that which took place in the department of the legislature.

Under the influence of the imperial will, not only did the *senatus-consulta* acquire more extensive proportions and more frequently determine points of civil law, but the emperor himself adopted the practice of promulgating his own orders, and gave to them the force of law under the name of *constitutiones*.

¹ Vide supra, § 222, note 2.

² Dig. 1, 15, *De officio præfecti vigilum*.



SECTION LXV.

THE SENATÛS-CONSULTA : THEIR EFFECTS UPON THE
JUS PRIVATUM.

347. The commencement of the transfer to the senate of legislative power, so far as regarded the *jus privatum*, has been ascribed to the time of Tiberius, on the faith of a passage in Tacitus. When speaking of the reign of this emperor, he says: "Then, for the first time, the *comitia* were transferred from the field (of Mars) to the Senate (*e campo comitia ad patres translata sunt*)." But Tacitus is only alluding to the election to the magistracies. Suetonius has made use of analogous and still more emphatic expressions about Julius Cæsar: *comitia cum populo partitus est*; which, however, merely indicates that the elections to all the magistracies, except those of the consuls, were made one-half by Cæsar and one-half by the people. Tacitus adds: "The people did not complain of this usurpation of its powers except by empty murmurings; and the senators, relieved from the necessity of buying or begging the suffrages of the electors, were thankful to Tiberius for the moderation he exercised in recommending only four candidates."¹ This practice of the emperor officially nominating persons to office commenced with Julius Cæsar. But while electing himself one-half only of the candidates, he left the other half to be elected by the people, and distributed, as Suetonius informs us, tablets with the following words upon them: "Cæsar, dictator, to such a tribe: I recommend to you N. or M., that he may receive the honour of your votes."² These recommendations then "from Cæsar to the tribes," "from Tiberius to the senate," can refer only to the appointment of officers and not to legislative acts. We have already shown how, speaking for his own times,

¹ Tacitus, *Annales*, 1, 15: "Tum primum e campo comitia ad patres translata sunt. . . Neque populus ademptum jus quæstus est, nisi inani rumore: et Senatus, largitionibus ac precibus sordidis exsolutus, libens tenuit, moderante Tiberio, ne plures quam quatuor candidatos commendaret."

² Suetonius, *Julius Cæsar*, 21: "Comitia cum populo partitus est; ut exceptis

consulatus competitoribus, de cetero numero candidatorum, pro parte dimidia quos populus vellet pronunciaretur, pro parte altera, quos ipse edidisset. Et edebat per libellos, circum tribus missis, scriptura brevi: 'Cæsar, dictator, illi tribui: Commando vobis illum et illum, ut vestro suffragio suam dignitatem teneant.'"

Cicero reckoned the *senatûs-consulta* among the sources of civil law; and how a few, although only a few, can be cited belonging to the time of the republic which had reference to the *jus privatum*.¹ There are, however, a few also bearing on the *jus privatum* which can, it is thought, without precise proofs, be attributed to the epoch of Augustus: such are the *senatûs-consultum* on the usufruct of perishable goods, and the *senatûs-consultum Silanianum*, both of uncertain date; two under Tiberius; a greater number under Claudius, among which are the two famous *senatûs-consulta Macedonianum* and *Velleianum*; and still more under Nero, among which are the *senatûs-consulta Trebellianum* and *Neronianum*. This form of enactment continued to be applied under succeeding emperors to important questions of the civil law, and has produced great and important materials for the study of this law. Pomponius, under Antoninus Pius, and Gaius, under Marcus Aurelius, declare the authority of the *senatûs-consulta* completely established.² Gaius, after having said "*Idque legis vicem obtinet*," adds this observation: "*Quamvis fuit quæsitum*," which has reference, no doubt, to the times anterior to the empire, when the jurists must have asked themselves whether the senate had the power thus to quit its executive and administrative sphere in order to regulate, with the authority of the *lex* or of the *plebiscitum*, matters which had reference to the *jus civile privatum*.

348. This power was no more conferred upon it by a formal act under the emperors than it was in the time of the republic. In the early times of the empire, the project of the enactment to be submitted to the *comitia* was, by a fictitious imitation of the ancient system, presented to the senate by the emperor in virtue of his consular or tribunitian power; and the senate having given its *auctoritas*, it was carried as a *rogatio* to the tribes. Several *plebiscita* indeed belong to the imperial era; those of Augustus and of Tiberius, for instance, are well known. On several occa-

¹ Vide supra, § 287 et seq.

² Dig. 1, 2, *De orig. jur.*, 2, § 9, fr. Pompon.: "Ita cœpit senatus se interponere; et quidquid constituisset, observabatur: idque jus appellabatur senatus-

consultum." Gaius, *Instit.*, comm. 1, § 4: "Senatûs consultum est quod senatus jubet atque constituit: idque legis vicem obtinet, quamvis fuit quæsitum."

sions, which became more and more numerous, the progress of imperial institutions caused the assembly by tribes to be given up, the *rogatio* to be set aside, and the *senatûs-consultum* to be passed upon the mere proposition of the prince, *epistola, oratio principis*. Then the language becoming corrupted as well as the institutions, the assemblies of the senate came to be called *comitia*, and the *senatûs-consulta, leges*.¹ A sign of the encroachment of the *senatûs-consulta* on the civil law is the name which, in imitation of the *leges* and of the *plebiscita*, these enactments had begun to take, whether from the emperor or from one of the consuls in office, sometimes even from some other individual, as, for instance, in the *senatûs-consultum Macedonianum*. It is, however, to be remarked that the termination *ianum* was specially reserved for them.

349. The series of *senatûs-consulta* affecting the *jus privatum* continued, during the imperial era, to run for about two centuries, till the time of Septimius Severus. After this date there is a degree of uncertainty whether there were any, and, if any, to what date they are to be ascribed. For a long time, however, we may set it down as a principle, as Ulpian remarks, in the time of Caracalla, "*non ambigitur Senatum jus facere posse*."² It is not difficult to account for this. In proportion as the form which the legislation took in the *senatûs-consultum* acquired strength and permanence, by being frequently employed, the *plebiscita* diminished in number, and soon disappeared; and in proportion as the imperial constitutions increased in number and in power, the *senatûs-consulta*, in their turn, became more rare, and they, in their turn, at last ceased: the abstract principle of the authority, in each case, still remaining in the law.

¹ Thus, J. Capitolinus (*Marco. Ant. philos.*, § 10), speaking of the assiduity of Marcus Aurelius at the sittings of the senate, expresses himself in these terms: "*Comitiis præterea etiam usque ad noctem frequenter interfuit: neque nunquam recessit de curia nisi consul*

dixisset, Nihil eos moramur, patres conscripti." Thus Gaius (*Instit.*, com. 1, § 86) says, "*Illa pars ejusdem legis*," speaking of the *Senatûs-consultum Claudianum*.

² Dig. 1, 3, *De legib. senat.*, 9, fr. Ulp.

SECTION LXVI.

CONSTITUTIONS OF THE EMPEROR (*Constitutiones principum*).

350. This is the last and was destined ultimately to be the only source of law. The generic name of "*constitutiones*" embraces all the acts of the emperor; but they must be divided into three distinct classes:—1st, the general ordinances spontaneously promulgated by the emperor (*edicta*); 2nd, the judgments rendered by him in cases which he decided in his tribunal (*decreta*); 3rd, the acts addressed by him to various persons, as, for example, to his lieutenants in the provinces; to the inferior magistrates of the city; to the prætor, or proconsul, who interrogated him on any doubtful point of law; to private individuals, who petitioned him in any circumstance whatever (*mandata, epistolæ, rescripta*).¹ Of these constitutions some were general and had universal application; others were particular, and only had reference to the cases and to the persons to which they were addressed. But here two questions require consideration: at what epoch did the imperial constitutions take their rise, and upon what authority were they based?

351. Some writers date their rise from the epoch of Adrian, on the ground that, before that time, the law appears to have been dependant entirely on *plebiscita* and *senatûs-consulta*. The most ancient constitution that we meet with in Justinian's collection does in effect belong to the time of Adrian; but everything goes to show, and it is generally agreed, that the origin of the constitutions must be ascribed to an earlier period, even as far back as the time of Augustus. Augustus had lieutenants to whom he delegated (*mandabat*) a portion of his authority in the imperial provinces immediately subordinate to him and independent of the senate; and it would clearly be his duty to give these officers instructions. That he frequently did

¹ Gaius, *Instit.* § 5: "Constitutio principis est quod imperator decreto, vel edicto, vel epistola constituit." Dig. 1, 4, *De constitutionibus principum*, 1, § 1, fr. Ulp: "Quodcunque igitur imperator per epistolam et sub-

scriptionem statuit, vel cognoscens decrevit, vel de plano interlocutus est, vel edicto præcepit, legem esse constat. hæc sunt quas vulgo *constitutiones* appellamus."

so is matter of history. This, then, accounts for the existence of *mandata*. Again, it frequently happened, that private individuals appealed to Augustus or solicited his protection and favour. To such applications and petitions he would necessarily send replies. Hence came *rescripta*. Long before the time of Adrian, the emperor had exercised authority in judicial matters. Sometimes in his tribunal in the forum he would as magistrate, in virtue of the powers vested in him, appoint a *judex*, and organize a suit according to the usual forms, or he would pronounce a decision himself *extra ordinem*. At others, in the exercise of his power as tribune, he would, upon the appeal made to him (*Cæsarem appello*), suspend the order of a magistrate or the sentence of a judge, and terminate the matter by deciding it himself. Again, under exceptional circumstances, civil and criminal cases would come before him.

Suetonius tells us, speaking of Augustus and Domitian, that they diligently performed their judicial duties; and we may gather from history, that they exercised herein very superior and altogether exceptional powers. Augustus sometimes transacted business of this nature at night, regardless altogether of the *sol occasus* of the Twelve Tables; at other times, regardless of the constitutional restrictions which made the forum the proper place for such transactions, he chose to perform them at his own residence, or else he would have a couch brought into court and recline upon it while exercising the judicial office.¹

Dion Cassius (iv. 4) notices the same feature in Claudius, and Tacitus (*Ann.*, iii. 10) describes how, after the death of Germanicus, the consuls, the accuser and the accused, all besought the Emperor Tiberius to hear and adjudicate on the affair. "*Petitumque est a principe cognitionem exciperet.*" There were thus *decreta*. Lastly, we find even from the very time of Julius Cæsar, indirect quotations from constitutions which introduced new provisions into the law, and could only be, for the most part, *edicta*.² It is admitted, that many innovations

¹ Suetonius, *Oct. Augustus*, § 33: "Ipse jus dixit assidue, et in noctem nonnunquam: si parum corpore valeret, lectica pro tribunali collocata, vel etiam domi cubans." Domitian, § 8: "Jus

diligenter et industrie dixit, plerumque et in Foro pro tribunali extra ordinem. Ambitiosas centumvirorum sententias rescidit."

² Julius Cæsar was the first to grant

which took place in the civil law were ratified by *plebiscita* or by *senatûs-consulta*.

Augustus and his immediate successors, indeed, always took care to obtain the sanction of the people, or of the senate, never allowing it to appear that they issued edicts or decrees except in virtue of the functions conferred upon them. The expression "edict," in fact, belonged to the functions conferred upon the emperor as magistrate; several grades of magistrates being in the habit of publishing edicts. While the term *constitutiones* is, in fact, nothing but a derivation from the expression *jus constituere*, employed equally in connection with the enactment of laws, the publication of *plebiscita*, the opinions of the jurists, and even with reference to their published works.¹

352. If it be asked by what right the emperors enacted their constitutions, we can only answer by the right of might. This is, in fact, the real nature of their authority, stripped of all the colouring and trappings of the ancient institutions with which the imperial power had clothed itself. When a man has raised himself to a position superior to all the magistrates and to the people, and where his will is supreme over the voice of the

to soldiers the right of making wills without the usual formalities. "Militibus liberam testamenti factionem primus quidem divus Julius Cæsar concessit. Sed ea concessio temporalis erat." Dig. 29, 1, *De testam. milit.*, 1, princ. frag. Ulp.

Augustus, Nerva and Trajan granted to soldiers the right of bequeathing their *peculium castrense*. ". . . Quod quidem jus in primis tantum militantibus datum est, tam auctoritate divi Augusti, quam Nervæ necnon optimi imperatoris Trajani: postea vero subscriptione divi Hadriani etiam dimissis a militibus, id est veteranis concessum est." *Inst.* 2, 12, pr.

Augustus was the first who conferred imperial authority upon the jurists, *respondere*. "Primus divus Augustus . . . constituit ut ex auctoritate ejus responderent." Dig. 1, 2, *De orig. jur.*, 2, § 47, fr. Pomp.

Augustus was the first to order the execution of the *fidei commissæ*. "Postea primus divus Augustus semel ite-

rumque gratia personarum motus vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere." *Inst.*, 2, 23, § 1. These were *mandata* and *rescripta*.

Augustus, and afterwards Claudius, prohibited by their edicts women from taking upon themselves the debts of their husbands. "Et primo quidem, temporibus divi Augusti, mox deinde Claudii, edictis eorum erat interdictum, ne feminae pro viris suis intercederent." Dig. 16, 1, *Ad senat. cons. Velleianum*, 2, pr. f. Ulp.

Tiberius decided a point of law in a case concerning one of his slaves. The Institutes, after setting out the legal point and the decision, add: "Idque Tiberius Cæsar in persona Parthenii servi sui constituit." *Instit.*, 2, 15, § 4. This constitution became at least a *decretum*.

¹ Vide supra, § 235.

nation, he has necessarily acquired the power of passing constitutions. But then the question arises, whether this power could give to the constitution, over legislative measures, the force of law, and by what steps were the public and the jurists induced to make the admission, "Quod principi placuit, legis habet vigorem?" These reflections lead us to an examination of a law the existence of which has given rise to much discussion, although all doubts on the matter have now been solved,—the *lex regia*.



SECTION LXVII.

LEX REGIA.

§53. According to the Institutes of Justinian, it is unquestionable that the emperor possessed the right of giving to his decrees the force of law, because the people by the *lex regia* had conceded to him all their powers; this assertion is repeated in the Digest, in a fragment of Ulpian. No historian, however, gives any account of this law, and Tribonian was at one time accused of supporting the theory of its existence by falsifying a passage of Ulpian, an accusation which by the other side has been declared unfounded. The discovery of the MS. of Gaius, however, removed all doubt as to the existence of such a law, but left the question open as to its nature and its provisions; and also as to whether it was an enactment passed at any given time to regulate for ever the imperial power, or whether it was passed anew upon the accession of each succeeding emperor. However, after the discovery of the Republic of Cicero, by comparing what is told us there about the constitution of the kingly office and the prerogatives of the king with what was done for the magistrates of the republic and what must have been done for the emperor considered as the chief magistrate, the doubt on this last point may be said to have disappeared.¹

¹ The following are the passages and the arguments. When I produced them in 1827 for the first time, the question had not been, as it is now, settled.

"Sed et quod principi placuit, legis habet vigorem; cum lege Regia, quæ

de ejus imperio lata est, populus ei et in eum omne imperium suum et potestatem concedat (others have *concessit*)."
Inst. 1, 1, § 6.

"Quod principi placuit, legis habet vigorem, utpote cum lege Regia, quæ

It is now universally accepted that this *lex Regia* referred to in the Institutes of Justinian is nothing more than the old *lex curiata*, enacted during the regal period by the *comitia curiata* upon the accession of each king, and by which he was invested with his powers: "*Vetus Regia lex, simul cum urbe nata*," as says Livy.¹ This *lex curiata* continued to be necessary to invest the magistrates of the republic with the *imperium*,² and it was ultimately applied at the time of each new imperial accession to the investiture of the emperor. And even after the time of Tiberius, when the *populus* had entirely ceased to be

de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat." Dig. 1, 4, 1 f. Ulp.

"Constitutio principis est quod imperator decreto, vel edicto, vel epistola constituit, nec unquam dubitatum est quin id legis vicem obtineat, cum ipse imperator per legem imperium accipiat." Gaius, *Instit.*, 1, § 5.

The passage of Gaius is clear, and can be literally translated thus:

"Nobody has ever doubted that these *constitutiones* had the force of law, since it is by a law that the emperor himself receives the empire." Gaius, *Instit.*, 1, § 5.

The sense of the Institutes and of the fragment of Ulpian is more obscure. The difficulty lies in the exact weight of the words *quæ de imperio ejus lata est*. The fragment which follows from the Republic of Cicero throws some light upon it. Cicero speaks of the manner in which the different kings of Rome were raised to the throne:

"... Numam Pompilium . . . regem . . . patribus auctoribus, sibi ipse populus adscivit, . . . qui ut huc venit, quamquam populus curiatis eum comitiis regem esse jusserat, tamen ipse *de suo imperio curiatam legem tulit.*" Cicero, *De republ.*, 2, § 13.

"Mortuo rege Pompilio, Tullium Hostilium populus regem, interrege rogante, comitiis curiatis creavit: isque *de imperio suo, exemplo Pompilii, populum consuluit curiatim.*" Ibid. 2, § 17.

"Post eum, Numæ Pompilii nepos ex filia, rex a populo est Ancus Martius constitutus: idemque *de imperio suo legem curiatam tulit.*" Ibid. § 18.

"Mortuo Martio, cunctis populi suf-

fragiis rex est creatus L. Tarquinius . . . isque ut *de suo imperio legem tulit*," etc. Ibid. § 20.

"Post eum, Servius Sulpicius primus injussu populi regnavisse traditur . . . sed Tarquinio sepulto, populum de se ipse consuluit, jussusque regnare, legem *de imperio suo curiatam tulit.*" Ibid. § 21.

Do not we see here the identical expressions of the Institutes of Justinian? Is not this the *lex Regia* of which Ulpian speaks: *quæ de ejus imperio lata est*? Was not the law the same for the emperor as for the king, which Cicero speaks of, *de imperio suo legem tulit*? Each king was called to the throne by the voice of the people; after having accepted the office, he caused himself to be invested with his power by a *lex curiata: legem de imperio suo ferebat*.

Each emperor was nominated by his predecessor, or by the acclamations of the army. The *senatus-consultum*, transformed no doubt into a *lex curiata* by the symbolical formality of thirty lictors, clothed him with his power: *lex Regia de imperio ejus ferebatur*. We might understand the silence of the historians upon the subject of a law which was a mere matter of form, and always ready for the strongest: but they are not even silent about it; they always describe the senate confirming the choice of the troops, and Eutropius says, speaking of Maximin: "*Post hunc Mariminus ex corpore militari primus ad imperium accessit, sola militum voluntate, cum nulla senatus intercessisset auctoritas.*" Eutr. lib. ix.

¹ Lib. xxxiv. § 6.

² Vide supra, §§ 27, 45, 68.

convoked, there was nothing to prevent the continuance of this practice. We know how it was enacted under the republic, that it was the duty of the senate to prepare the decree, and that the representatives of the thirty curies—the thirty lictors—were present, whose duty it was to enact a *lex curiata*.

354. The term *lex regia* does not appear in the text of Gaius: it is an old tradition. Notwithstanding the aversion to royalty, many of its substantial characteristics, as well as terms peculiar to it, were preserved under the republic as old symbolic forms; and it is possible that this *lex de imperio* or *lex regia* upon the accession of each emperor was re-enacted, it being presented, according to the ancient custom, by an *interrex* to the electors for their suffrages.¹ The emperor Alexander Severus, somewhere in the Code, calls it the *lex imperii*.² We have an example in the *Lex de imperio Vespasiani*, the latter articles of which have been found inscribed upon a bronze table which was discovered at Rome in 1342, under the Pontificate of Clement VI., and which was transferred in 1576 to the Capitol by the order of Pope Gregory XIII. From these articles we find that it was frequently the custom to limit to the emperor the powers which had been already decreed to his predecessor.³

¹ Cicero, *De lege agraria*, iii. § 2: "Omnium legum iniquissimam dissimillimamque legis esse arbitror eam quam L. Flaccus, interrex, de Sulla tulit: UT OMNIA QUÆCUMQUE ILLE FECISSET, ESSENT RATA."

² Code, 6, 23, *De testamentis*, 3, constit. Alexand.: "Licet enim *lex imperii* solemnibus juris imperatorem solverit, nihil tamen tam proprium imperii est, quam legibus vivere." We shall find in one of the articles of the law, *De imperio Vespasiani*, the provision which absolves the emperor from the power of the laws.

³ Tac., *Hist.*, lib. iv. § 3: "At Romæ Senatus cuncta principibus solita Vespasiano decrevit."

See the text of the articles which have reached us: Orelli has inserted them in his *Inscriptionum latinarum selectarum amplissima collectio*, tit. 1, p. 567:

"Fœdusque cum quibus volet fa-

cere liceat. ita. uti. licuit. divo. Aug. Ti. Julio. Cæsari. Aug. Tiberioque Claudio. Cæsari. Aug. Germanico

"Utique. ei. senatum. habere. relationem. facere. remittere. senatusconsulta. per. relationem. discessionemque. facere. liceat. ita. uti. licuit. divo. Aug. Ti. Julio. Cæsari. Aug. Ti. Claudio. Cæsari. Augusto. Germanico

"Utique. cum. ex. voluntate. auctoritateve. jussu. mandatuve. ejus. presentive. eo. Senatus. habeatur. omnium. rerum. jus. perinde. habeatur. servetur. ac. si. e. lege. senatus. edictis. esset. habereturque

"Utique. quos. magistratum. potestatem. imperium. curationemve. cujus rei. petentes. Senatui. Populoque. Romano. commendaverit. quibusve. infractionem. suam. dederit. promissionum. comitis. quibusque. extra. ordinem. ratio. habeatur

"Utique. ei. fines. pomerii. profectum. promovere. cum. ex. republica. com-

SECTION LXVIII.

THE RESPONSA PRUDENTUM.

355. As all power was lodged in the hands of the emperor, it is but reasonable to suppose that jurisprudence and the interpretation of the law would not altogether escape his influence. The subjection of the magistrates was already complete, and in like manner the ancient independence of the jurists also had to yield to imperial will. "It is well to remember," says Pomponius, "that before the time of Augustus the right to give opinions publicly concerning the law had not been conceded by the chiefs of the republic, but that all those who considered themselves sufficiently learned were at liberty to give their opinions to those who thought fit to consult them. These opinions were not given under the seal of the jurist who delivered them; but he in many cases himself wrote to the judge; in other cases, the parties who came to consult the jurist brought with them witnesses, who before the judge testified as to the opinion given. Augustus, whose object it was to give additional authority to the law, was the first who gave to the jurists the right to express their opinions by virtue of imperial authority, and this authorization being once established it was supplicated as a favour."¹

bit . esse . liceat . ita . uti . licuit . Ti.
Claudio . Cæsari . Aug . Germanico

"Utique . quæcumque . ex . usu . rei-
publicæ . majestate . divinarum . huma-
narum . publicarum . privatarumque .
rerum . esse . censebit . ei . agere . facere .
jus . potestasque . sit . ita . uti . divo .
Aug . Tiberioque . Julio . Cæsari . Aug .
Tiberioque . Claudio . Cæsari . Aug .
Germanico . fuit

"Utique . quibus . legibus . plebeive .
scitis . scriptum . fuit . ne . divus . Aug .
Tiberiusve . Julius . Cæsar . Aug . Ti-
beriusque . Claudius . Cæsar . Aug . Ger-
manicus . tenerentur . iis . legibus . ple-
bisque . scitis . imp . Cæsar . Vespasianus .
solutus . sit . Quæque . ex . quaque . lege .
rogatione . divum . Aug . Tiberiumve .
Julium . Cæsarem . Aug . Tiberiumve .
Claudium . Cæsarem . Aug . Germani-
cum . facere . oportuit . ea . omnia . imp .
Cæsari . Vespasiano . Aug . facere . liceat

"Utique . quæ . ante . hanc . legem .

rogata . acta . gesta . decreta . imperata .
ab . imperatore . Cæsare . Vespasiano .
Aug . jussu . mandatuve . ejus . a . quo-
que . sunt . ea . perinde . justa . rataque .
sint . ac . si . populi . plebisve . jussu . acta .
essent

SANCTIO.

"Si . quis . hujusce . legis . ergo . ad-
versus . leges . rogationes . plebisve . scita .
senatusve . consulta . fecit . fecerit . sive .
quod . eum . ex . lege . rogatione . ple-
bisve . scito . s . ve . c . facere . oportebit .
non . fecerit . hujus . legis . ergo . id . ei .
ne . fraudi . esto . neve . quid . ob . eam .
rem . populo . dare . debeto . neve . cui .
de . ea . re . actio . neve . judicatio . esto .
neve . quis . de . ea . re . apud . se . agi .
sinito

¹ Dig. 1, 2, *De orig. jur.*, 2, § 47, f.
Pomp.: "Et, ut obiter sciamus, ante
tempora Augusti publice respondendi
jus non a principibus dabatur: sed qui

356. Such was the course pursued by Augustus. He wished, so he said, to give more credit, more authority to jurisprudence (*ut major juris auctoritas haberetur*): he desired that the responses of the jurists should be a species of emanation and delegation of his own power (*ut ex auctoritate ejus responderent*): he therefore created a class of privileged jurists, who thus became officials, invested by him, with the right of responding under imperial sanction, and who gave their opinions under the sanction of their seals (*responsa signata*), which attested the fact of their being authorized.

357. The history of this authorization of the jurists is extremely obscure as to details. During its gradual development we find enactments concerning it, such as a rescript of Adrian, two *constitutiones* of Constantine, a *constitutio* of Theodosius and of Valentinian; but the only effect of this is to add to our previous difficulty that of correctly interpreting these passages. The dominant idea of Augustus is clear; the responses of the jurists were to be given under his sanction. Caligula, who was a mischievous fool, pushed the matter further; it was he who wanted to destroy the poems of Homer, to exclude from all libraries the works of Virgil and of Livy; it was he who, according to Suetonius, boasted that he had abolished the science of jurisprudence, and taken the right of giving legal opinions from all but himself.¹

But what was this licence, *respondere, publice respondere, populo respondere*,—what was the real force of these technical expressions? So far as the various texts tell us, these expressions in the time of Augustus merely related to opinions given to those who went to consult the jurist (*consulentibus respondebant*), and which were exhibited by them to the judges, frequently under the form of a letter written by the jurist himself

fiduciam studiorum suorum habebant, consulentibus respondebant. Neque responsa utique signata dabant: sed plerumque iudiciis ipsi scribebant; aut testabantur qui illos consulebant. Primus divus Augustus, ut major juris auctoritas haberetur, constituit, ut ex auctoritate ejus responderent: et ex

illo tempore peti hoc pro beneficio cepit."

¹ Suet., *Caligula*, § 34: "De jure quoque consultis, quasi scientia eorum omnem usum aboliturus, asper jactavit, se, mehercle, effecturum, ne qui respondere possint præter eum."

to the judge (*plerumque iudicibus ipsi scribebant*), or under the attestation procured by those who sought the response; and in the time of Augustus, in the form prescribed by the constitution. It is only by enlarging upon the idea, and by conjecture, that we can include in this privilege the authorship of books, collections or treatises upon jurisprudence. Here there was a great difference. An opinion might be given in the exercise of the profession, in an individual case, in order to inform the parties and the judge, to a certain extent, *ad hoc* and *ad hominem*. It was conceived that the exercise of this profession should be restricted, and it is so almost everywhere at the present day. In the lower empire an official character was given to the advocate and the number limited, and medical men also were licensed.¹ A book, on the contrary, is for general use; its publication is not a professional act; it is a production which, according to its merit, may survive its author or not; it may or may not be regarded as an authority. This, however, is certain, the authorization given to the jurists by Augustus was confined to their opinions.

358. *Publice respondere* does not signify to give opinions at the public expense. Augustus in no way attached the jurists, to whom he conceded this privilege, to his paid officials; indeed the ancient honorary character of the Roman jurist was retained long after this period. Nor did *publice respondere* mean to respond in the name of the people. This expression was in use long before the constitution of Augustus. Pomponius, in his *De origine juris*, thus employs it in connection with Tiberius Coruncanius, "*Ante Tiberium Coruncanium publice professum neminem traditur*," and by the use of the expression *populo respondere* he gives to it its true meaning: thus, speaking of Aquilius Gallus, he says, "*Maxime auctoritatis apud populum fuisse*." These jurists gave their opinions publicly, that is to say, to the people, to all who came to consult them.² *Publice scribere* is used by Pomponius as synonymous with *populo respondere*; the two expressions being used indifferently by

¹ Cod. 1, 7, *De advocatis diversorum et medicis*.
judiciorum; 10, 52, *De professoribus*

² Vide supra, § 236.

him to denote the same act of Masurius Sabinus, who, it must be remembered, gave his name to the school of the Sabinians, and who was the first to receive the imperial authority *publice respondere*:¹ the word *scribere* was used because official responses were required to be in writing and attested with the seal of the jurist.

359. It may be asked, were these official responses or opinions obligatory upon the judge? Could it at this period be said "*legis vicem obtinet*?" Savigny and Puchta favour the affirmative, Hugo and Zimmern the negative, which accords with our own view. The imperial authority doubtless gave to the opinion great weight with the judge; but, in many cases, a conflicting opinion, signed by a jurist also authorized, would be laid before him. How then could each have the force of law? He could not act upon both opinions. The credit thus acquired by the authorized jurist would necessarily and reasonably extend to their books. We know that the works of the various authors exhibit great diversity of opinion, and that these conflicting opinions gave rise to different schools: what then is the basis of the idea that the imperial authority gave to the legal opinion any obligatory force? Pomponius speaks of jurists having greater authority with some than with others; for instance, he says of Proculus, the founder of the school of the Proculians, "*sed Proculi major fuit auctoritas*;" whereas, if their opinions had possessed the force of law, one would not have been superior to another. Add to this, if there was any obligatory force involved in the permission, it would be necessary, in cases where there was diversity of opinion, to establish some rule as to priority; but the first with which we are acquainted is that of Adrian.² The time was to come, however, when opinions, extracted from the writings of the authorized jurists, were to be dignified with the name *leges*, and when the jurists themselves were to be called *legislatores*. These expressions we shall find in many documents; but till the reign of Adrian, saving the

¹ Dig. 1, 2, *De orig. jur.*, 2, § 47, f. Pomp.: "Masurius Sabinus . . . *publice primus scripsit*; posteaque hoc cepit beneficium (dari) a Tiberio

Cesare: hoc tamen illi concessum erat. Ergo Sabino concessum est a Tiberio Cesare, ut *populo responderet*."

² Vide infra, § 388 et seq.

fact that credit attached to the opinions of those jurists who had received the imperial sanction *publice respondere* (*ut major juris auctoritas haberetur*), the responses and the teachings of the jurists were left to the appreciation of the judges and of the public.

360. The general inference is, that the privilege of giving advice or of declaring opinions was not confined to those who enjoyed the imperial authority. The Roman citizen in the most practical manner made himself a jurist; he attended and took part at the consultations and teachings of his seniors, and in due time followed in their course. Unless it was a case of exceptional favour, it was necessary, in order to enable him to obtain the imperial authority, that he should have acquired a certain reputation for knowledge of law, the giving of opinions and advice. We have the example of Nerva the younger, who, being only about seventeen years of age—an age at which it is unreasonable to suppose that he was authorized—had already upon several occasions been publicly consulted, and had given his opinion.¹

Without investigating the motive of Adrian, which we shall consider in its proper place, we may rest satisfied that it was not a question under Antoninus Pius of the jurists responding in the name of the prince in those *stationes publicæ respondentium* or courts for public consultations of which Aulus Gellius speaks.² Nor was it so when the same Aulus Gellius³ was sent back to consult the jurists or their pupils commencing to practise (*juris studiosi*). The idea of Caligula, it is true, was radically exclusive, but this was but an idea of Caligula.

The opinions of the unauthorized jurists could not, doubtless, be given in the form or with the official character imparted to those who were authorized by Augustus. It is perhaps reasonable to suppose that the opinions of the unauthorized were only given to those who went to consult them, the judge being obliged only to accept those that were official. Perhaps, also,

¹ Dig. 3, 1, *De postulando*, 1, § 3, f. Ulp.: "Qua ætate (17 years), aut paulo majore, fertur Nerva filius et publice

de jure responsitasse."

² Aul. Gell. lib. xiii. 13.

³ Ibid. xii. 13.

certain honorary advantages, with which we are not acquainted, attached to their authority; such, for example, as those we meet with at a later period, conferred upon the official professors of law and medicine. These, however, are mere conjectures. As to the exclusive privilege of writing, the question does not even arise.¹

360 A. It is a singular fact that, with the exception of Masurius Sabinus, who, according to Pomponius, was the first to receive the imperial authority *publice respondere*, we have no exact indication amongst the celebrated jurists of those to whom this concession was made. We have to wait for a Greek writer of the time of Valentinian, Valens and Gratian, Eunapius, who, speaking, in his life of the philosopher Chrysanthius, of a certain Innocentius, a jurist, who is unknown in legal history, says that this Innocentius had received, with the consent of the emperor (Diocletian, or perhaps the son of Constantine), the *jus publice respondere* in terms analogous to those which we meet with in Gaius, though considerably stronger, "*Condendarum legum arbitrium et auctoritatem.*" It may be asked were the emperors liberal or otherwise in their grants of this privilege, and were all those eminent jurists whose reputation is certified in the fragments of their works which have come down to us favoured with it or not? No one has taken the trouble to inform us upon this point, and if we adhere to a passage in Pomponius, the first concession was that made to Masurius Sabinus, which must have been by Tiberius, in this way making it appear that Augustus, who was the author of the innovation, had never himself bestowed the privilege. Did Labeo and Capito, the illustrious heads of the two schools, enjoy it? All is conjecture: it is even a question, after the constitution of Theodosius II. and Valentinian III., what value should be attached to the opinions of the jurists, and whether Gaius himself had ever received this privilege, that is to say, before this constitution gave to his works an imperial sanction.*

361. Another important point to be considered in connec-

¹ Vide § 357.

* Vide §§ 393, 500.

tion with the position of the jurist is the influence that he enjoyed as a counsel in the administration of public affairs, in the preparation of legislative measures, and in the solution of legal difficulties. During the republic, the magistrates, the prætors and the judges themselves could call to their aid, in the discharge of their functions, the jurists, to whom they were free to refer any difficulty, and from whom they might seek counsel. But when the permanent authority of the imperial will was established above these temporary magistracies, governing, legislating and adjudicating, this assistance became more marked, and a constant resort to it more necessary; and it would appear that the emperor would require to have constantly at his side legal authorities to whom he might refer at need. And in this he was only following the traditional practice of the ancient magistrates. We see an indication of this practice in the resort which Augustus and his successors had to the assistance of the *concilia semestria* in order to discuss beforehand matters that were to be laid before the senate.¹ Tiberius added to his friends and associates, as a species of council for public matters, twenty of the chief citizens. However, it was far from being a desirable privilege to be of that council, for, according to Suetonius, with the exception of some two or three, they were all under one pretence or another put to death.² We read also of a council under Claudius and his successors. Adrian added to his council the prætors, the distinguished senators and certain knights.³ Alexander Severus summoned to his council, according to the nature of the subject, the most competent persons, learned and discreet men when it was a question of law or negotiation, and experienced military men when it was a matter relating to their peculiar province. The historian Lampridius gives us some details concerning the councils of Alexander Severus. The counsellors had a certain

¹ Suet., *Octav.*, 35: "Sibique instituit consilia sortiri semestria, cum quibus de negotiis ad frequentem senatum referendis ante tractaret." Also Dion Cassius, liii. 21, and lvi. 28.

² Suet., *Tiberius*, 55: "Superiores amicos ac familiares, viginti sibi e numero principum civitatis depopos-

cerat, veluti consiliarios in negotiis publicis. Horum omnium vix duos aut tres incolumes præstitit: ceteros alium alia de causa, perculit." See also Dion Cassius, lvii. 7.

³ Dion Cassius, lx. 4, *Claudius*; Spartian, *Adrian*, 8 and 21.

time given to them to deliberate and to make up their minds upon the matter submitted to them; their opinions were taken individually, each being reduced to writing.¹ A *notarius*, or secretary of the council, having made a false report in a certain cause, Alexander Severus condemned him to transportation, after having caused the nerves of his fingers to be severed so as to render it impossible for him ever to write again.² This *consilium*, without any fixed organization, and varying according to the will of the emperor, is the origin of the institution which appeared at a later date with a permanent character and fixed constitution, known from the time of Diocletian as the *consistorium*, and which became an institution of the lower empire. When the matter under consideration was a judgment, the place where the emperor, assisted by his council, gave audience was called the *auditorium*, and, by a figure of speech, this portion itself of the council bore the same name. We find this word in use from the time of Marcus Aurelius. Thus the fragments of Ulpian speak of decrees passed in the *auditorium* of the emperor in general, and particularly in the *auditorium* of Marcus Aurelius, of Severus and of Antoninus.³ The same word was also applied to the sittings of other magistrates.

It is a matter of doubt whether the expression in the text, *in auditorio*, refers to the *auditorium* of Longinus or to that of Papinian,⁴ the prætorian præfect.

We find indications in many places of the part taken by the most eminent jurists in advising the emperor; sometimes by giving their opinions upon abstruse and important matters under legislative consideration; sometimes in assisting to prepare the *senatûs-consulta* for the emperor to lay before the senate, and in the preparation of various constitutions; in others, in advising on decrees or judgments delivered in suits. Sometimes we read of their being convoked or specially consulted upon important

¹ Lampridius, *Alexander Severus*, 15. See the whole paragraph and the last passage: "Ut si de jure aut de negotiis tractaret, solos doctos et disertos adhiberet: si vero de re militari, milites veteres et senes ac bene meritos."

² Ibid. § 27.

³ Dig. 36, 1, *ad S. C. Trebell.*, 22, pr. f. Ulp.; 4, 4, *De minor.*, 18, §§ 1, 2, f. Ulp.

⁴ Dig. 49, 9, *An per alium*, 1, f. Ulp.; 12, 1, *De reb. credit.*, 40, f. Paul. See also 40, 15, *Ne de statu defunct.*, 1, § 4, fr. Marcian.

matters in council, sometimes separately, or else taking part as a matter of course in the proceedings of these councils, and especially in the *auditorium*. Thus, when Augustus had to determine a point regarding codicils, he convoked the jurists and submitted the matter to them.¹ Adrian, when he assumed the position of a judge, always surrounded himself with jurists as his assessors, amongst whom were to be found especially Celsus, Salvius Julianus and Neratius Priscus, of whom Trajan thought so much that he at one time conceived the idea of appointing him his successor.² The counsellors of Antoninus Pius in legal matters were jurists, Vindius Varus, Salvius Valens, Marcellus and Mœcianus.³ The "divine brothers" (Marcus Aurelius and Lucius Verus), in the text itself of a rescript issued concerning a difficulty as to the succession of the enfranchised, took care to state that their decision had been arrived at after having examined into and discussed the matter with Mœcianus and several other jurists, whom they style their friends.⁴ The emperor Septimius Severus, when delivering his decision upon some fiscal matters, promulgated a decree, which is inserted in the Digest, upon the advice of Papinian and Messius; and another at the suggestion of Tryphonius (*Tryphonino suggerente*), who was one of his assessors.⁵ Lampridius gives a list of one-and-twenty counsellors of Alexander Severus, amongst whom are sixteen jurists, styled by the historian "professors of law, pupils of the illustrious Papinian, friends and assessors of the emperor Alexander Severus;" in which we find the well-known names of Ulpian,

¹ "Dicitur autem Augustus convocasse prudentes, inter quos Trebatium quoque cujus tunc auctoritas maxima erat, et quæsiisse an posset hoc recipi, nec absonans a juris ratione codicillorum usus esset." Instit. 2, 25, *De codicillis*, pr.

² Spartian, *Adrian*, 17: "Cum judicaret, in consilio habuit non amicos suos aut comites solum, sed jurisconsultos, et præcipue Julium Celsum, Salvium Julianum, Neratium Priscum, quos tamen Senatus omnis probasset." 5: "Frequens sane opinio fuit, Trajano id animi fuisse, ut Neratium Priscum, non Adrianum, successorem relinqueret."

³ Capitolin, *Antoninus Pius*, 12: "Multa de jure sanxit, usque est jurisperitis, Vinidius Varo, Salvio Valente, Volusio Mœciano, Ulpio Marcello et Jabolleno." It is doubtful whether Javolenus was alive at this period, and it is suspected that there is an error here either of the writer or in the MS.

⁴ "... Volusius Mœcianus, amicus noster." "Sed cum et ipso Mœciano, et aliis amicis nostris jurisperitis adhibitis, plenius tractaremus: magis visum est, . . ." &c. Dig. 37, 14, *De jur. patron.*, 17, pr. f. Ulp.

⁵ Dig. 49, 14, *De jure fisci*, 50, fr. Paul.

Paul, Marcianus, Florentinus and Modestinus, with whom the list of the great Roman jurists closes. The more ancient names which appear by mistake in this list prove that this passage has been altered.¹ Alexander Severus never sanctioned any constitution without having first taken counsel with twenty jurists and other advisers, so as never to have upon such occasions less than fifty opinions in his council.² He at one time conceived the idea of adopting a system of uniforms, but he abandoned it, the project being disapproved of by Ulpian and Paul, who were of opinion that it might be ridiculed. Ulpian was his prætorian præfect and perpetual assessor. He was in the habit of receiving his friends together and never separately, and only made an exception in the case of Ulpian, on account of his singular virtue (*causa justitiæ singularis*). Whenever he had to entertain the other præfects, he always summoned Ulpian. He always liked to have Ulpian or some other learned man present at his family repast, in order to have literary conversation, which he said was at the same time recreation and nourishment.³ Ulpian was a kind of tutor to him, and Lampridius finishes by saying that if Alexander Severus was a great emperor, it was because he governed the republic chiefly by the counsels of Ulpian.⁴ Every one knows how many high offices, prætoriates, præfecturates, consulates and proconsulates, were filled under Augustus and his successors by jurists.

SECTION LXIX.

LABEO AND CAPITO (*M. Antistius Labeo et C. Atcius Capito*)—

THE TWO SCHOOLS OF THE JURISTS: THE PROCULEIANS OR PEGASIAN AND THE SABINIAN OR CASSIAN.

362. These rival jurists differed as much in their politics as in their jurisprudence. Let us borrow the comparison drawn between them by Tacitus and Pomponius. "Having for his

¹ Lampridius, *Alexander Severus*, 67: " . . . Hi omnes juris professores discipuli fuere splendidissimi Papiniani, et Alexandri imperatoris familiares et socii."

² Ibid. § 15.

³ Lamprid., *Alex. Sever.*, §§ 24, 25, 33.

⁴ Lamprid., *Alex. Sever.*, § 50: "Ulpianum pro tutore habuit. . . . atque ideo summus imperator fuit, quod ejus consiliis præcipue rempublicam rexit."

grandfather a centurion of Sylla, and for his father an ancient prætor, Ateius Capito, by the study of law, placed himself in the first rank. Augustus hastened to elevate him to a consulatè, in order that he might surpass Antistius Labeo in dignity, as Antistius Labeo surpassed him in learning. For this age produced at the same time two of those geniuses who are ornaments to their country. Labeo, who was incorruptible and independent, attained the greater celebrity: Capito, who was a courtier, acquired the greater promotion. The first, who only attained the dignity of prætor, received in exchange for imperial neglect public esteem: the second, who reached the consulate, amassed a fortune, which was accompanied by envy and animadversion."¹

Thus speaks Tacitus; and Pomponius, after having said of one that he was a consul, and of the other that he did not wish to be one, and that he refused that dignity which Augustus offered him, thus characterizes the difference between the genius of the two men:—"Ateius Capito continued to represent things as they had been represented to him: Labeo, with more ingenuity, full of confidence in his opinions, and well grounded in many sciences, aimed at originality, and introduced several innovations."

363. It is to these two jurists that Pomponius also refers the origin of the two schools: to Labeo that of the Proculéians or Pegasians (*Proculéiani*, *Pegasiani*); to Capito that of the Sabinians or Cassians (*Sabiniani*, *Cassiani*). Such an event was not without significance. Under a system where jurists, invested with a sort of public character, guided by their answers suitors and even judges, it was not without a sense of its importance that they could be seen forming schools and dividing themselves into two opposite parties. But what was the cause of this separation, and wherein consisted the distinction between the two schools? It may be conjectured, with some degree of certainty, that the study of law as a science had already com-

¹ Tacit., *Annal.*, 3, § 75. Horace having become a courtier throws a stone

at Labeo:

Labeone insanior inter sanos dicatur.
(*Sat.* 3, lib. 1.)

menced at this epoch to assume a phase different from that which had characterized the pursuit of it at the time of Tiberius Coruncanius and of his successors. Instead of being confounded with practice, and of being settled day by day as each new point arose requiring solution, the pursuit of law as a science was unfettered. It had become an important branch of study, exhibiting theoretically a collection of principles reduced to a science altogether independent of the courts and pleaders, without however losing the practical element which has always characterized Roman jurisprudence. In a word, the study of law as a science had been created. It may be said to have had professors (*præceptores*) and schools (*scholæ*). This is certainly the case as regards later times, for Ulpian speaks of professors of civil law (*juris civilis professores*), whom he ranks with philosophers;¹ and Modestinus gives his views on the exemption from guardianship with respect to those who were professors of law either at Rome or in the provinces (*legum doctores docentes*).² But even if we go back to earlier times, we find that Gaius frequently calls the Sabinians, whose doctrines he followed, *præceptores nostri*, and the Proculians, *diversæ scholæ auctores*, expressions which denote distinctive teaching. Javolenus, speaking of a still earlier period, also makes use of the terms *præceptores tui*.³ We know that Sabinus, the disciple of Capito, under Tiberius, made his livelihood by the fees he received from his auditors.⁴ Lastly, Pomponius tells us of Labeo himself that he had arranged his time in such a manner as to spend six months in town with his students and six months in retirement to write his books.⁵

364. Thus, already in the time of Labeo and Capito, there were, in the proper acceptation of the word, schools (*scholæ*), or bodies of students (*studiosi*), attached to each of these jurists.

¹ Dig. 50, 13, *De extraord. cognit.*, 1, § 5, f. Ulp.

² Dig. 27, 1, *De excusat.*, 6, § 12, f. Modest.

³ Dig. 42, 5, *De reb. auct. judic.*, 28, f. Javolen.

⁴ Dig. 1, 2, *De orig. jur.*, 2, § 47, f. Pomp.: "Huic (Sabino) nec amplæ

facultates fuerunt, sed plurimum a suis auditoribus sustentatus est."

⁵ "... Totum annum ita diviserat, ut Romæ sex mensibus cum studiosis esset, sex mensibus secederet, et conscribendis libris operam daret." Dig. *De orig.*, 2, § 47.

Considering how these two men differed in politics, one being a courtier of Augustus, the other a staunch republican,—and considering, too, that there was the same difference in the cast of the two minds,—we can easily believe that even during their lifetime they took widely divergent paths. One was content to be led, the other was accustomed to assert his independence both in science and politics. One was devoted, not so much to the letter of the law, as it has been incorrectly called, as to generally accepted traditions in jurisprudence; the other, while bringing to the pursuit of his favourite study the whole resources of science and philosophy, was inclined to adopt more liberal views.

That considerable differences of opinion, amounting to what may be called a schism, should have existed between the two schools, is therefore only what might have been expected, even if the opposition had been confined to the scholars or partisans of either professor. In general history we read of Labeo and Capito as two rivals; in a history of Roman law we must be prepared to find this rivalry still more strongly defined. But the jurists separated themselves into two distinct schools only when the students had become themselves jurists—when the disciples had succeeded to the masters—Nerva, Proculus and Pegasus to Labeo, Sabinus and Cassius to Capito,—and when the two systems had been perpetuated. And therefore the two schools did not take the names of the two primitive founders, Labeo and Capito, but were called after the teachers who succeeded the first founders, the Proculcians or Pegasians deriving their origin from Labeo, the Sabinians or Cassians taking theirs from Capito.

365. Now if we seek for a distinct line of demarcation between the two systems, or for a fundamental difference in the principles inculcated by them, sufficient to account for the diversity of their respective opinions on different points, the search will be in vain. Such radical distinction never existed, nor could exist.

It is not correct to say that the decisions of the one were based upon strict law, those of the other upon equity; that

the one were innovators, and the other mere followers of tradition, for equity and innovation will be found sometimes on one side and sometimes on the other. It is equally incorrect to attribute to the two whole schools the diversities of character or of genius which distinguished the two jurists, the first founders of those schools. On the one hand, Roman jurisprudence, both in theory and application, was at all times eminently practical, and both schools aimed at this end; on the other hand, the representative men of the respective schools had their predilections, and as one succeeded another their predilections characterized their teaching. There were two schools or sects, and upon certain controverted points each school maintained its peculiar opinion; their pupils, at a later time their followers, as professors in their turn transmitting their peculiar doctrines to their successors; but there was not an inflexible line of demarcation between them: on more than one occasion the followers of one system abandoned the doctrines of their own school and adopted the opinions of the other.¹ On the other hand, time and study gave rise to new points involving fresh conflict of opinion: *eas dissensiones auxerunt*, says Pomponius.² The whole system was therefore a successive transmission of opinions from the leaders of the schools to their disciples, sufficiently elastic to admit of a certain latitude and to allow scope for the exercise of the criticism and individual genius of each jurist.

366. This system continued for nearly two centuries. Pomponius, who wrote under Antoninus Pius, gives us, distinguishing them by their schools and bringing them down nearly to his own time, lists of the principal jurists,³ who can be arranged in the following order:

Sabinian or Cassian.

Capito.

Masurius Sabinus.

Proculeians or Pegasusians.

Labeo.

Nerva the elder.

¹ Thus Proculus and Celsus, in the fragments quoted in the Digest (7, 5, *De usufr. ear. rer.*, 3, f. Ulp; 28, 5, *De hered. inst.*, 9, § 14, f. Ulp.), adopt some opinions of the Sabinians. And inversely Javolenus, in the example

furnished by the Digest (28, 5, *De heredit. instit.*, 11, f. Javol.), approves an opinion of Proculus.

² Dig. 1, 2, *De orig. jur.*, 2, § 47, f. Pomp.

³ Ibid.

Gaius Cassius Longinus.	Proculus.
Cælius Sabinus.	Nerva the younger.
Priscus Javolenus.	Pegasus.
Alburnus Valens.	Juventius Celsus the elder.
Tuscanus or Tuscus Fuscianus.	Celsus the younger.
Salvius Julianus.	Neratius Priscus.

367. The distinction was prolonged still further, for Gaius, who wrote under Marcus Aurelius, indicates his connection with the Sabinians by the constant use of the expression *nostri præceptores*.¹

But it eventually disappeared: and the great personal reputation of a lawyer like Papinian, who was styled the "Prince of Jurists," was calculated to efface the distinctions of the past by centering all attention upon himself. Nevertheless the divergence in opinion of the Sabinians and Proculeians on a great number of questions has come down to us through some extracts from their writings, and the trace of it is still to be found more than once in the Digest of Justinian, notwithstanding the harmony which it was the object of the compilers to introduce. It was thought that a third school of eclectics, named *Erciscundi* or *Miscelliones*, was formed during the time of Adrian; but this must be considered as a mistake of Cujas, who first set up the theory.

368. If, after having examined the changes that occurred in the *jus publicum*, we look at the *jus privatum*, we shall find that in the matter of marriages, *fideicommissa*, and enfranchisement, there were three essential innovations, all of which were brought on by circumstances.

¹ Especially Gai., *Instit.*, 2, § 195 et seq.

SECTION LXX.

LEX JULIA, DE MARITANDIS ORDINIBUS; LEX PAPIA POPPÆA:
called also LEGES JULIA ET PAPIA, *sometimes* NOVÆ
 LEGES, *or simply* LEGES ON MARRIAGE AND ON PATER-
 NITY.

369. The last days of the republic were marked by an astonishing depravity in morals; the marriage of citizens (*juste nuptiæ*) had been abandoned, or transformed into libertinism through annual divorces. It could then be said of the Roman ladies, "They do not reckon years by the consuls but by their husbands." Celibacy was in fashion. Civil wars and proscriptions had left great voids in families; and under an inundation of slaves, of freed men or of foreigners, the race of citizens was disappearing. More than once the censors had pointed out the danger. Augustus tried to remedy, by laws and fiscal measures, the corruption of morals and the exhaustion of the legitimate population. A former *plebiscitum*, proposed with that object, on the marriage of the two orders, *lex Julia, De maritandis ordinibus*, after having failed the first time before the vote of the comitia, B.C. 18, had at last been adopted more than twenty years subsequently, A.D. 4. There is, however, a difference of opinion as to these dates, and more recent writers set the failure of the proposed *plebiscitum* at B.C. 28, and the passing of it at B.C. 18. A second law, the *lex Papia Poppæa*, some years afterwards, A.D. 9, completed the enactments on this subject.¹ The title technically adopted by the Roman jurists for their commentaries on these legislative measures was that of *ad legem Juliam et Papiam*² and the expression *lex Julia et Papia*, which is frequently to be met with in their writings, made people think that the first of these laws was incorporated in the second, so as to form one. Nevertheless, jurists frequently quote these laws separately, citing either

¹ "Papia Poppæa, quam senior Augustus, post Julias rogationes, incitandiscœlibum pœnis et augendo œrario, sanxerat." (Tacitus, *Annal.* iii. § 25.) Orotolan's learned colleague, M. Machalard, has published a very interesting

book on these laws.

² Such is the title which is constantly to be met with in the Digest of Justinian, at the head of the fragments of those commentaries which are inserted in it.

the *lex Julia* or the *lex Papia*. And the title *novæ leges*, or simply *leges*, the laws *par excellence*, designates them collectively.

370. This was a considerable code: the most extensive after the laws of the Twelve Tables, and one which produced a great impression upon society. Not only marriage, but everything even remotely connected with it—betrothal, divorce, dower, gifts between husband and wife, concubinage, inheritance, and the period allowed for entrance upon it, legacies and their devolutions, *dies cedens*, the capacity or the incapacity of beneficiaries to receive—in fine, the rights, privileges or particular dispensations granted under divers special circumstances to fathers or to mothers who had children, or who had a specified number. The whole legislation on these subjects formed an important body of fresh regulations, which come into contact in a greater or less degree with many parts of the civil law. And therefore the commentators of whom we were speaking just now, among whom were some of the most eminent jurists, did not overlook the *lex Papia*. And the number of fragments of these various commentaries entitled *ad legem Papiam*, which we still find in the Digest of Justinian, are evidence of the deep impression that this effort of legislation had left in jurisprudence. The best attempt at the exposition of this law, up to our time, is that made by Heineccius. But the discovery of the Institutes of Gaius has supplied us with some valuable information, and has enabled us to correct several errors into which our predecessors were led by the absence of documents.¹

371. The *lex Julia* and the *lex Papia Poppæa* divided the whole of Roman society into two distinct classes: 1st, by virtue of the *lex Julia*, the unmarried (*cælibes*) and the married; 2nd, by virtue of the *lex Papia*, persons without children (*orbi*), and those who had some (*patres* or *matres*).

The word *cælebs*, living in celibacy, was not understood in the sense which it bears now; it meant any one who was not married, whether a widower, a widow or divorced; whence arose

¹ Gai., *Instit.*, 2, § 206 et seq., § 286, &c.

the necessity, in order to escape the penalties of the *lex Julia*, after the dissolution of the first marriage immediately to contract a second. Women were the only persons who enjoyed a *vacatio* or right to a certain delay: that is to say, one year from the death of a husband, six months from the time of a divorce, periods which the *lex Papia* prolonged to two years, and to eighteen months respectively. It was necessary, moreover, that the marriage should not be contracted in contravention of certain new injunctions or prohibitions which were contained in the *lex Julia*, and which we find enumerated under one of the headings of the *Regulæ* of Ulpian (tit. 16), unfortunately partly lost. Except within these conditions, marriage was insufficient to prevent persons from being classed as *cælibes*, and to secure them from the consequences of being so classed.

The word *orbis* meant a person who being married had not at least one legitimate child living: it was not sufficient to have had children; it was necessary to have at least one still living at the period when the enjoyment of the rights attached to the status of father accrued. The adopted child, who was first reckoned as such, was afterwards excluded by a *senatus-consultum*, which Tacitus mentions (*Ann.*, 15, § 19). The marriage of which the child was issue was also obliged to be in conformity with the regulations of the *leges Julia et Papia*, in default of which the child would not have been reckoned qualified to give the status and the privileges of a father. It is to be noticed, that as a consequence of Roman ideas concerning the constitution of the family and paternity, this condition of the legitimacy and of the existence of the child is rigorously applied to the father only. As for the woman, the *lex Papia* gives room to other ideas: whether the offspring was legitimate or not, it was fecundity that was rewarded; if she could reckon three confinements, being *ingenua*, or four if an enfranchised (*ter quaterve enixa*), she had the *jus liberorum*.

The *leges Julia et Papia Poppæa* were combined in such a manner as to grant rewards of various kinds to those who were married and fathers, and to punish with various disabilities those who had no children (*orbi*), and more severely still unmarried persons (*cælibes*). The most vulnerable point, and that on

which the legislature struck with the greatest effect, was the right of profiting from testamentary dispositions. The *leges Julia et Papia Poppæa* did not take away from the *cælibes* or from the *orbi* the capacity of being instituted heirs or of realizing legacies. Such provisions made to their advantage remained valid in principle, according to the ordinary rule; they continued to say of them, conformably to this law and in technical language, that they had the *testamenti factio*. What the *leges Julia et Papia* withdrew, in different proportions, from the *cælibes* and from the *orbi*, was the right to take those testamentary gifts which might have been bequeathed to them (*jus capiendi ex testamento*), unless they had previously obeyed the provisions of those laws, and a certain period was even allowed to them that they might put themselves in a position to be in conformity with the law on this head. The unmarried person (*cælebs*) could not take any part of what had been left him; the *orbis* could only take one-half. A period of a hundred days from the death of the testator, or, to speak more in accordance with the new order of things, from the opening of the will, was given to unmarried persons to contract marriage, and probably also to married citizens, although the positive authority of the texts is wanting on this last point, to see whether in the meanwhile some legitimate child might not be born to them.

372. From the date of the enactment of these laws the distinction between the two rights *testamenti factio*, or that of being validly instituted heir or having a claim to other testamentary gifts, and the *jus capiendi ex testamento*, or that of being permitted to realize testamentary gifts, became established; and the separation between the two became, as time went on, more and more strongly marked, until at a much later period, through other legislative changes, this distinction again disappeared.

373. Thus, then, testamentary dispositions, the institution of heirs, or legacies, although valid according to civil law, fell, as it were, under the operation of the *leges Julia et Papia*, in all or in part, out of the hands of the person who had a claim to them, and were therefore called *caduca*. This adjective,

caducus, *caduca*, *caducum*, denoting a quality so often characteristic of testamentary dispositions, was transformed into a substantive, and became a common expression, and the *caduca* held an important place in the writings of jurists, and materially influenced the domestic life of the citizens. The literature of those times, the works of historians and essayists as well as poets, are full of allusions to this *caduca* and to the deep impression made upon society by these laws.

The forfeitures resulting from provisions of the ancient civil law were affected by these enactments, and bequests thus affected were assimilated to the *caduca* and treated in the same manner; they were described in jurisprudence as being *in causâ caduci*, that is to say, in the condition of the *caduca*.

374. Our great interpreters of Roman law in the sixteenth and seventeenth centuries could form but an incomplete notion of the rewards of paternity, the traces of which they found in histories and literature generally, and in some fragments of works on Roman jurisprudence. Nor could they understand what the destination was which was given by the *leges Julia et Papia* to the dispositions *caduca* or *in causâ caduci*—they lacked documentary evidence on the subject. It was generally believed that the *caduca* were directly vested in the treasury, and thus current opinion exaggerated the fiscal character of the *leges Julia et Papia*, which were sometimes called, on account of their principal provisions, caducary laws.

The

Jam pater es ! . . .

of Juvenal,

Legatum omne capis, nec non et dulce caducum,

was not well understood. We, however, can read all the details of it in the Institutes of Gaius. It is now known that the *lex Papia* gave those portions which were *in causâ caduci* not in virtue of the provisions of the will, but of its own provisions, to the heirs and to the legatees contained in the will who had children (*patres*); taken away from one, applied to another, the *caduca* were, at the same time, a punishment for sterility and a reward for legitimate procreation. It was not a right conferred

by the will to take lapsed devises or bequests, but a right conferred by law; and therefore the technical name was *jus caduca vindicandi*, the right to claim the *caduca*. And this mode of acquisition was reckoned among the means of acquiring the Roman *dominium* in virtue of the law (*ex lege*).¹ The *lex Papia* determined exactly the order in which the *patres* inscribed in the will should be allowed, as the price of their paternity, to claim the *caduca*,² and it was only for want of any heir or legatee having children that the *caduca* were swept into the *ærarium* or treasury of the people; in order, says Tacitus, that failing the rights of paternity it might be the people, as being the common father, who should come forward and realize the forfeited gifts.³ I suspect the sentence of Tacitus is an extract from some statement of objects and reasons, or official panegyric upon the *lex* when under discussion.

375. The *leges Julia et Papia* exempted certain persons from their provisions; some on account of age, others of some incapacity to comply with the requisitions of these laws; others again by reason of cognation or alliance. These are the persons who are described in works on jurisprudence under the title of *personæ exceptæ*, and as, in virtue of the dispensation or exemption in which they found themselves, they were allowed to receive entire the testamentary gifts which were made to them, the Roman jurists have styled them *solidi capaces*; which does not much resemble, I think, the Latin of the time of Augustus.

376. Lastly, the ascendants and descendants of the testator to the third degree were placed in a much better position. "The legislator had blushed," says a constitution of Justinian, "to impose his yoke on such persons" (*suum imponere jugum erubuit*), and he preserved to them in consequence the enjoyment of their ancient rights. The Roman jurists have said of them that they had the *jus antiquum in caducis*. Thus main-

¹ Ulp., *Regul.*, 19, § 17.

² Gai., *Instit.*, 2, §§ 206, 207.

³ "Ut si a privilegiis parentum cessaretur, velut parens omnium populus

vacantia teneret." Tacit., *Ann.*, 3, § 28. Also Gaius, 2, § 286: "Aut, si nullos liberos habebunt, ad populum."

tained in the enjoyment of their ancient civil rights, without considering whether they were married or unmarried, whether they had children or not, they came not only to receive the corpus, in succession to their ancestors or to their descendants, of the testamentary gifts specifically left to them, but also to take, according to the rules of the ancient right of accretion, the portions *caduca* or *in causâ caduci* if there were any.

377. Such were the *leges Julia et Papia Poppæa*, which, suppressed in part by a constitution of Caracalla, as to the privileges of paternity relative to the claim upon the *caduca*, and by Constantine to the penalties for celibacy, were only completely and textually abrogated by Justinian. Their extinction was therefore gradual. This final destiny of the caducary laws is not, historically, without its difficulties. Among these are serious doubts as to the effects which should be attributed to the constitutions of Caracalla, of Constantine, and of Justinian. We shall shortly examine this question when we pass in review the legislative measures of these emperors.

SECTION LXXI.

FIDEICOMMISSA—CODICILS (*Codicilli*).

378. There were certain testamentary dispositions which were void according to civil law; the testator who wished to make them could only entrust them to the good faith of his heir (*fidei committere*), and ask him to be good enough to execute them. Those dispositions were called *fideicommissa*. On the other hand, every wish of the deceased was also void if it had not been legally expressed in the will, appropriate formalities having been observed. Written down without any solemnity, these *codicilli* were only a prayer addressed to the heir, who was left free to accede to it or not as he pleased. However, in proportion as it was left optional by the law, the more public opinion was brought to bear on the man who wished to take advantage of his freedom. Augustus, who was

several times instituted heir, made it a point of duty to execute the trusts imposed upon him; he ordered even the consuls to exert their authority to protect the wishes of the testator, whenever equity and good faith should require it. General custom and good feeling confirmed these decisions, and the principle soon came to be so fully recognized that few wills were made without *fideicommissa* and without codicils. It became necessary, as we shall see, at last to create two fresh prætors, for the special purpose of dealing with these matters, who decided each case extraordinarily, without sending it before a judge, upon its merits.¹



SECTION LXXII.

ENFRANCHISEMENT—LEX ÆLIA SENTIA—LEX FURIA
CANINIA.

379. The wars of Marius and of Sylla, of Pompey and of Cæsar, arming thousands of slaves, had thrown into Rome legions of freedmen; distant victories, accumulating captives in Italy, multiplied the number of freedmen but diminished their valour. Citizens enfranchised their slaves to increase the number of clients, sometimes in order that the slave, having become a citizen, should receive his share in the gratuitous distributions; but more frequently at the moment of death, in order that a long retinue of freedmen, with a cap of liberty on their heads, might follow the funereal car. The *lex Ælia Sentia* and the *lex Furia Caninia* put restrictions on these practices. We shall have to examine these laws when we come to consider the Institutes of Justinian, for they were prolonged down to that epoch.

380. We must not leave the reign of Augustus without an allusion to an event which, though almost unperceived in the Roman empire, was destined to change the face of that empire, and, later, that of the whole universe. It was in the year of the city 753, fourteen years before the death of Augustus, that Jesus Christ was born in a village of Judæa.

¹ Instit. 2, 23, *De fideio. hæreditatibus*, §§ 1 and 25, *De codicillis*.

A.D. 14. TIBERIUS EMPEROR.

381. Tiberius had been adopted by Augustus. At the death of the latter it was not known how things would turn out; it was the first time the Roman empire had to pass from one emperor to the other. Tiberius, indeed, assumed the government in fact; but he appeared to act only as a tribune, and merely to settle the honours that were due to the memory of his father. The senators in their hearts knew perfectly well what were their own rights, but they were in suspense; their eyes were fixed upon the emperor, and they were trying to study their conduct in his. We read in Tacitus how well that farce was played out, how the senators entreated the adopted son of Augustus to accept the empire, and how he put forward all sorts of reasons why he ought to refuse; urged that the administration should be lodged in the hands of several persons at once, or that some one should be associated with him, and how he hastened to accept when he feared he should be taken at his word. The first years of his reign were little else but a drama, in which every one played a part. The part Tiberius assumed was that of moderation, of simplicity, and of respect for the laws; he, however, always attained his object, and his natural character showed itself in his actions or in his desires.

Under him the elections were transferred from the people to the senate, the emperor reserving to himself the right of designating a few candidates.¹ The crime of high treason was extended to all overt and covert acts inimical to the emperor; the charge of treason was added to every accusation, and this crime was proved when all other charges failed. And then appeared that hideous class of citizens, the informers. The history of Tiberius is little else but a long enumeration of sentences of death pronounced by the senate, to whom the prosecution of that crime had been referred.

382. The most striking provision in the civil law of that reign is the division of the freedmen into two classes, the enfranchised citizens and the enfranchised *Latini Juniani*. This

¹ Tacit., *Ann.*, 1, c. 15.

distinction, which was the work of the *lex Junia Norbana*, depended on the mode of enfranchisement, and of some other circumstances; the one acquired entire liberty and the qualification of citizens, the others a lesser degree of liberty and only the rights of the Latin colonists.

We are of the opinion of those who place this *lex Junia Norbana* in A.D. 19, under Tiberius. It was later by fifteen years than the caducary laws of Augustus, calculating from the date of the *lex Papia*. Following in the wake of these laws it was a new application to the enfranchised Latini Juniani of the distinction between the *testamenti factio*, or the capacity of making wills, and the *jus capiendi ex testamento*, or the capacity of receiving under a will, and thus gave rise to a new source of *caduca*,—hence the term *novæ leges*.¹

383. The jurists of note in this reign are Sabinus (Masurius Sabinus) and Nerva the father (M. Cocceius Nerva); the former the successor of Capito, who gave his name to the school of the Sabinians, the latter the successor of Labeo;² Proculus (Sempronius Proculus, frag. 37; and Cassius (C. Cassius). The former succeeded Nerva, giving his name to the school of the Proculeians, originated by Labeo; the latter succeeded Sabinus.

384. The period of the emperors was that in which the study of civil law made the greatest stride: jurists were multiplied, and numerous works on law made their appearance. All the principles of law were developed and connected together; and jurisprudence became a great science, closely studied in every branch. Political rights, however, did not undergo much change; for despotism is not an innovator. Augustus had laid down all the fundamental bases of absolute power; and his successors had only to allow them to be consolidated by time. New institutions are rarely met with, even at long intervals. Political agitations and disturbances had another object than formerly. In a republic, which is a reign of law, political agitation is directed to bringing about a change of

¹ See Ortolan's *Inst.*, vol. ii. pp. 65, 719, *his*.

² We shall indicate under each emperor the principal jurists, even if we

can only give their names; the figures indicate the number of fragments which have been borrowed from them as laws in the composition of the Digest.

laws; under a despotism it is aimed at change of masters. This truism suggests the character of the history of this period: Tiberius is suffocated by Caligula, who hastens to succeed him; Caligula is sacrificed to a conspiracy of knights and senators, and Claudius, carried to the throne by prætorian guards, is poisoned by his wife; Nero is compelled to stab himself; Galba, elected by the legions of Spain, cut to pieces by the prætorians; Otho and so many others meeting a like fate. It is unnecessary to dwell in detail on such events as these: it is sufficient to point at them as the inevitable consequences of the system of government adopted by the Romans and of the conduct of their emperors, and this reflection is the only profit we can draw from their study. Our remarks will be confined to giving a list of the emperors who succeeded each other, with indications of a few trifling changes which they introduced, the names of the most illustrious jurists, with the nature and the character of their works.

EMPERORS.

A.D. 37. Caligula (Caius Cæsar, *cog.* Caligula).

„ 41. Claudius.

Under the latter were created the two *prætores fideicommissarii*, of whom we have already spoken.

„ 54. Nero.

„ 68. Galba (Servius Sulpicius).

„ 69. Otho.

„ „ Vitellius.

„ 70. Vespasian.

„ 79. Titus.

Under the latter one of the *prætores fideicommissarii* created under Claudius was suppressed.

„ 81. Domitian.

„ 96. Nerva.

„ 98. Trajan. (Ulpian Trajanus Crinitus, *a senatu optimi cognomine appellatus*.)

The following jurists flourished under this emperor:—

Celsus the younger (P. Juventius Celsus, frag. 142).

Neratius Priscus (frags. 64).

Priscus Javolenus (frags. 206).

EMPEROR.

A.D. 117. ADRIAN (ÆLIUS HADRIANUS).

385. The reign of Adrian has been remarked as forming a new epoch in legal history. It is true that under this emperor the division of Italy into four provinces, entrusted to persons of consular dignity, took place; also the creation of two imperial councils, the germ and the character of which we have already indicated¹ under the name of consistory and auditory (*consistorium, auditorium principis*); also the commencement of the civil jurisdiction of the prætorian præfects, who up to that time had been regarded only as military authorities; also the institution of appeals (*appellatio provocatio*), which permitted the parties, condemned by a judicial authority, to resort, within a given time, to the superior magistrate, and sometimes even to the emperor, who constituted the last and highest court of appeal. But the events which have the most interest for us are the commencement of the imperial constitutions; the extinction of the right which the magistrates had always enjoyed of publishing edicts; and the permission restored to the jurisconsults of giving answers on points of law without being specially authorized. All these alleged changes, however, may be disputed. We have already shown that the imperial constitutions existed under Augustus; let us examine the modifications which the *jus honorarium* and the *responsa prudentum* underwent.



SECTION LXXIII.

JUS HONORARIUM—THE *Edictum Perpetuum* OF SALVIUS JULIANUS.

386. A work on the edict appeared, in the time of Adrian, under the title of *edictum perpetuum*, a title for a long time applied to the annual edicts of the magistrates in opposition to the occasional edicts which some peculiar circumstances might

¹ Vide *supra*, § 345.

render expedient.¹ What was that work? its aim, its effect? It was, or it appears to have been, a methodical arrangement of the prætorian law, of the various edicts published up to that time, and of the provisions established by common use. Its author, Salvius Julianus, was an illustrious jurist of that epoch, who held the office of prætor. Before his time, however, similar arrangements had been made by prætors who had preceded him. Pomponius, in his abridged exposition of the History of Roman Law, cites Aulus Ofilius, one of the intimate friends of Cæsar (*Cæsari familiarissimus*), as having been the first to publish a carefully-made collection of the edicts of the prætors, *edictum prætoris primus diligenter composuit*.²

387. Many have thought that from the moment it was promulgated the magistrates were ordered to conform to its provisions, and that they were restrained from the right of publishing edicts themselves.³ It must be admitted that this prohibition would

¹ Vide supra, § 288.

² Dig. 1, 2, *De orig. jur.*, 2, § 44, f. Pomp.

³ It may be asked whether the *Edictum Perpetuum* was the independent work of a jurist, or whether it was the result of an order given by the emperor and clothed with a legislative character. Was it published with the intention of its being perpetual? and was the right taken from the magistrates of publishing their respective edicts? These are two questions worthy of consideration. It was Salvius Julianus who composed the *Edictum Perpetuum*. Eutropius says, when speaking of him: "Qui sub divo Adriano perpetuum composuit edictum" (lib. viii. *Emperor Julian*); and Aurelius Victor: "Primus edictum, quod varie inconditeque a prætoribus promebatur, in ordinem composuit" (*De Cæsaribus*, § 19). But this work was not simply a commentary upon the edicts. This is clear in the first instance from its title. Had it been a commentary, it would have taken the name of *ad edictum*, and not that of *edictum perpetuum*. In addition to this we have two texts, which tell us that the emperor took part in its construction. These are two passages in

Justinian—the one in Greek, the other in Latin; the following is the former: "The divine Adrian of happy memory, when he had collected together all the prætors, published all their annual edicts with the assistance of the illustrious Julianus, and said publicly that if there was any case which had not been provided for, the magistrates should endeavour to decide it by an induction from the already existing rules." Code 1, 17, *De veter. jur. enucl.*, const. 3, § 18. The second is: "Cum et ipse Julianus legum et edicti perpetui subtilissimus conditor, in suis libris hoc retulerit: ut si quid imperfectum inveniat, ab imperiali sanctione hoc repleatur; et non ipse solus, sed et *divus Hadrianus in compositione edicti, et senatusconsulto quod eam secutus est*, hoc apertissime definiit ut si quid in edicto positum non inveniat, hoc ad ejus regulas ejusque conjecturas et imitationes possit nova instruere auctoritas." Ibid. const. 2, § 18. It is therefore evident that it was Adrian himself who caused these edicts to be compiled; and this was followed by a *senatus-consultum*, probably with the intention of confirming it. For these reasons it may be stated that the

accord with the progress of imperial authority—the emperor wielding supreme power, and issuing, as from the fountain source of authority, his decrees, rescripts and edicts, would be inclined to prevent the magistrates from sharing these powers with himself. Nevertheless there are several reasons for supposing that they did preserve, even after the time of Adrian, their original privileges; and all we can say as to the result of the *edictum perpetuum* of Salvius Julianus is, that the prætors were obliged to adopt its provisions and to conform thereunto; and they had only the right of adding such accessory rules and forms as the course of events or altered circumstances might render necessary. It is easy to understand that their powers would be limited in this way; for at this time the prætorian law was completely developed and had attained that point at which further development was impossible.

edictum perpetuum was called *edictum D. Hadriani*. The second question is more difficult to answer. The epithet *perpetuum* given to this edict must not be taken as conclusive evidence that it was promulgated with the view to its being final as to futurity, the phrase *edictum perpetuum* having been for a long time employed by the prætors; that is to say, in order to indicate an edict which should be permanent throughout the year (vide §§ 274 and 288); but that which may not be concluded from the epithet given to it, may be from the reflection that Adrian would not have attached so much importance to the work he had in hand; nor would he have invested it with his sanction, and, as it would appear, with that of the senate also, had his object been simply to give it effect for one year.

However, there is a passage in Gaius, who is of a later date than Adrian, to the effect that the magistrates continued to publish their edicts: “Jus autem edicendi habent magistratus populi; sed amplissimum jus est in edictis duorum prætorum, urbani et peregrini, quorum in provinciis jurisdictionem præsidet earum habent; item in edicto

ædilium curulium, quorum jurisdictionem in provinciis populi quæstores habent; nam in provincias Cæsaris omnino quæstores non mittuntur, et ob id hoc edictum in his provinciis non proponitur.” Gai., *Instit.*, 1, § 6.

Nor is it possible to suppose, that had the magistrates lost their right of making edicts, Gaius, who lived so near the time of Adrian, so far from not speaking of such a change, would say that the magistrates possessed this right. Nor would he have accurately distinguished the various edicts. How could he have added that quæstores were not sent into Cæsarian provinces, nor had they in those provinces this species of edict. What then must be our conclusion? On the one hand that the *edictum perpetuum* received a species of legislative authority and became a general and special law—a branch of the *jus honorarium*. On the other, that this did not prevent the magistrates from publishing their edicts, which, however, they conformed to the *edictum perpetuum*, adding those necessary provisions which the course of time or altered circumstances necessitated.

SECTION LXXIV.

THE ADVICE AND THE OPINIONS OF THE JURISTS (*Sententiæ et Opiniones*).

THE EXPRESS AUTHORITY CONFERRED BY THE RESCRIPT OF ADRIAN.

388. The rescript addressed by Adrian to those prætorian personages who demanded from him the privilege of giving *responsa* has been preserved by Pomponius and is in the following terms:—"Hoc non peti, sed præstari solere: et ideo si quis fiduciam sui haberet, delectari si populo ad respondendum se præpararet."¹

This passage clearly contains a witticism, the point and meaning of which is however lost to us. Spartian, in his Life of Adrian (sect. 19), says that he was fond of *jeux des mots* and raillery: "*joca ejus plurima exstant, nam fuit dicaculus.*" Such being the case, did he by this answer mean to say that the privilege of giving *responsa* was not a thing to be asked from a prince, but was one which was due to those who were worthy of it? or that it was not a matter of favour but a mark of public confidence? Or again, that it was not a thing to be petitioned for, but to be conferred without solicitation, on the same principle that honours and distinctions are supposed to be granted in these days? The real point, however, of this phrase is lost to us. Thus much, however, is certain, that the answer of Adrian is the opposite of that which took place from the time of Augustus. "*Et ex illo tempore peti hoc pro beneficio cæpit,*" says Pomponius. "*Hoc non peti, sed præstari solere,*" said the emperor Adrian in his rescript. And so, then, as now, in the bestowal of honorary distinctions theory and practice were two different things.

But independently of this witticism the conclusion itself is not less obscure. Did the emperor Adrian graciously, and in

¹ Dig. 1, 2, *De origine juris*, 2, § 47, fr. Pomp.: "Primus divus Augustus, ut major juris auctoritas haberetur, constituit ut ex auctoritate ejus responderent: *et ex illo tempore peti hoc pro beneficio cæpit*, et ideo optimus prin-

ceps Hadrianus, cum ab eo viri prætori peterent ut sibi liceret respondere, rescripsit eis, *hoc non peti, sed præstari solere*: et ideo si quis fiduciam sui haberet, delectari si populo ad respondendum se præpararet."

generous terms, concede to those prætorians that which they had requested? or did he in fact refuse their request till they had given proof of their ability, thus sending them back to exercise the faculty common to all of giving *responsa*, but without authority? Or did he in fact wish to lay it down as a principle, that so far as he was concerned, he intended to abstain from granting that authority which had been received from his predecessors; and to state that he preferred the ancient custom according to which every man was free to ascertain his own acquirements and to seek the confidence of the public? This may be possible. The anecdote is interesting, though enigmatical, and after all it is but an anecdote; and it would be an error to conclude that Adrian had abolished the rule established by Augustus relatively to the authorization of the jurists to give *responsa*. Whatever might have been the sentiments of Adrian, as expressed in this anecdote, later jurists, when referring to the system of authorized *responsa*, speak of it as still existing.

389. It is, in fact, from a rescript of this same emperor, so at least we find from Gaius, that legal force was first given to the advice and opinions of jurists (*quibus permissum est jura condere*). This change was introduced with the greatest possible reserve as the first step in a new direction. It gave to those opinions the force of law (*quæ legis vicem obtinet*); but it gave it in the most narrow terms, and only in those cases where the opinions of all the jurists were unanimous. Where they were not unanimous the judge was free to exercise his own discretion.¹

390. In order clearly to understand this matter, it is necessary to determine who were those *quibus permissum est jura condere*. Our esteemed and learned colleague, M. Demangeat, urges that two entirely distinct things should not be confounded,

¹ Gaius, *Instit.*, comm. 1, § 7: "Responsa prudentium sunt sententiæ et opiniones eorum *quibus permissum est jura condere*; quorum omnium si in unum sententiæ concurrant, id quod ita

sentiant legis vicem obtinet; si vero dissentiant judici licet quam velit sententiam sequi; idque rescripto divi Hadriani significatur."

the *jus publice respondendi* and the *permissio jura condendi*. He says that the first of these exclusively referred to the right of consultation upon matters specially determined, upon which the jurist gave his advice; the second concerned the different writings—compilations, treatises, commentaries or otherwise—published by jurists; that after the death of a distinguished jurist it not unfrequently occurred that by an imperial constitution, force or authority was given to his works; and that it is such jurists who are referred to by Gaius in the expression *quibus permissum est jura condere*.¹ This idea would furnish a very neat and intelligible explanation of what was meant by unanimity of opinion that was necessary to bind the judges; but unfortunately this is nothing but a hypothesis, and does not appear to be supported by the facts within our knowledge. Indeed, the expression *quibus permissum est* indicates living jurists to whom the permission was granted to exercise the right during their lives. Of this we have at least two clear examples—that of Masurius Sabinus, who might be rejected on the ground that he belonged to the time of Augustus or of Tiberius, and that of Innocentius, to which no such objection can be urged, inasmuch as he belonged to the time of Diocletian, or later;² and it would be exceedingly difficult so to construe this expression as to make it referable to those works which had received sanction after the death of their authors; in addition to which we have no trace whatever of any such imperial constitution. We must go to the lower empire—to the period when the science of law was no longer a living science—to find anything analogous to those supposed constitutions. We may remark, in addition, that this phrase *jura condere*, and other similar expressions, were employed concerning jurists anterior to the empire, to bear testimony to their great authority, without the slightest reference to any authority given to their works after their decease. We find Pomponius saying of the jurists Publius Mutius and Brutus and Manilius, and of the

¹ Demangeat, *Cours élémentaire de droit romain*, vol. i. p. 88 et seq. Upon this subject, which has been dealt with by a great many writers, I must especially draw attention to essays by two

of my colleagues, M. Bodin, in the *Revue historique*, vol. iv. p. 197 et seq., and M. Glasson, *Étude sur Gaius et sur le jus respondendi*, Paris, 1867.

² Vide supra, § 361.

Pontifex Maximus Quintus Mutius Scævola, all of the time of the republic, "*qui fundaverunt jus civile—jus civile primum constituit?*" The expressions *jus fundere, constituere, condere*, must be understood to apply to jurisprudence, that is to say, to interpretation, the work of the jurists. Justinian styles the jurist Salvius Julianus: "*legum et edicti perpetui conditor.*"¹ The emperor Alexander, in a constitution respecting military testaments, relies upon the advice of the jurists and the constitutions of his ancestors: "*Sententiis prudentium virorum et constitutionibus parentum meorum placet.*"²

The most rational view, and that best borne out by the facts, appears to be to adhere to what is stated in the Institutes of Justinian, that by the jurists *quibus permissum est jura condere* are to be understood those *quibus a Cæsare jus respondendi datum est.*³ The expression *jus respondendi* is the first employed. It is to be found in use from the time of Augustus to the constitution of Adrian. Pliny the younger uses it in a letter where, relating an anecdote, he expresses a doubt as to the sanity of Priscus Javolenus, adding—"however, he holds office, takes part in the councils, and even *jus civile publice respondet.*"⁴ And though Pliny does not say so in actual words, the sense indicates that he means with the imperial authorization. Such being the case, this would be a third example. The same expression is to be met with in the demand addressed to Adrian: "*ut sibi liceret respondere.*" Almost immediately after the constitution, and as a consequence of it, the expression *permissum est jura condere* was adopted, which we meet with for the first time in Gaius, and more emphatically still in the

¹ Cod. 1, 17, *De vet. jure enucleando*, const. 2, § 18: "Cum et ipse Julianus legum et edicti perpetui subtilissimus conditor, in suis libris hoc retulerit."

² Cod. 6, 21, *De testam. milit.*, 5, const. Alexand.

³ Just. *Instit.*, 1, 2, § 8: "Responsa prudentium sunt sententiæ et opiniones eorum *quibus permissum erat jura condere*. Nam antiquitus institutum erat, ut essent qui jura publice interpretarentur, *quibus a Cæsare jus respondendi datum est.*"

⁴ Pliny the younger, *Letters*, vi. 15.

A Roman knight of some position gave a public reading of some elegies, when Priscus Javolenus, his intimate friend, was present. The poet commenced in these terms: "Priscus! You order!" "I," said Priscus Javolenus, surprised and thereby distressed, "I don't order anything!" This produced considerable merriment; and Pliny the younger makes this the basis of the following opinion:—"Est omnino Priscus dubius sanitatis: interest tamen officii, adhibetur consiliis, atque etiam *jus civile publice respondet.*"

authority given to Innocentius.¹ When speaking of ancient jurists of the time of the republic, the expression used is *veteres juris auctores*. When referring to those authorized by the emperors simply *juris auctores*. The epithet continues to increase in force, for under the lower empire the decisions of the jurists finish by being called *leges*, and the jurists themselves *legislatores*.

§91. Finally, the gradual progress made by the decisions of the jurists towards becoming a recognized source of civil law appears to be the following. Till the time of Augustus there was entire liberty of consultation, the credit given to the opinions and works of the jurists depending upon their value or the success which they obtained; the decisions generally approved in theory, and received in practice, as the traditional jurisprudence forming in the civil law the *lex non scripta*. From the time of Augustus, certain jurists were authorized—that is, they had the *jus respondendi*; their opinions, notwithstanding the special credit which they derived from the imperial authorization, did not constitute law binding upon the judges. Their works, however, became the more valuable from their reputation, but at the same time acquired no obligatory force. Other jurists, as well as those authorized by the emperor, were free to give their opinions to litigants, or to compile works upon law which met with greater or less success, but without the imperial sanction. Adrian is the first who gave the force of law to the decisions of the authorized jurists; but he gives this force in the narrowest possible manner—that is, only where they are unanimous. From this period we can class in the *lex scripta* the authorized *responsa prudentium*, for not only were they reduced by them to writing, but in virtue of the rescript of Adrian—that is to say, of a presumptive right given them by the then fountain of legislative power they became law, *legis vicem obtinent*—that is, when they were unanimous; and still later, under the lower empire, the emperors extended to great lengths the principle thus initiated.

¹ See § 361.

JURISTS: VALENS (ALBERNUS VALENS, frag. 20).

JULIAN (SALVIUS JULIANUS, frag. 457). Julian was prætor, *præfectus urbi*, and twice consul. His reputation with the lawyers mainly depends upon the prominent part that he took in the construction of the *edictum perpetuum*, in which he was employed by Adrian, in consequence of which he is styled by Justinian *Legum et edicti subtilissimus conditor*. All that we possess of this edict, to which we shall subsequently refer more particularly,¹ are some scattered fragments in the Digest from which the critics have endeavoured to arrange and reconstruct it.² Amongst the other works of Julian to which reference has been made in the Digest of Justinian, there is a digest, in ninety books (*Digestorum libri nonaginta*), and a monograph upon ambiguities (*De ambiguitatibus lib. sing.*)

AFRICANUS (SEXTUS CÆCILIVS, frag. 131) was a pupil of Salvius Julianus. We find from several passages in the Digest, that he put questions to him, took notes of his answers, and that he freely referred to him as an authority.³ The one hundred and thirty-one laws to which his name is attached in the Digest are extracts from his nine Books of Questions (*Questionum libri novem*), the difficulty of translating which has become a proverb among the interpreters: "*Lex Africani, id est difficilis.*"

A.D. 138. EMPEROR: ANTONINUS PIUS. (T. ANTONINUS FULVIUS, PIUS COGNOMINATUS.)

392. Antoninus was adopted by Adrian, whom he succeeded, and proved to be one of the best of the emperors. He encouraged learning and philosophy, and, at the national expense, paid a number of professors to teach publicly both at Rome and in the provinces. We find a rescript of his, in the Institutes, containing the order to punish the cruelty of masters by compelling them to sell the slaves they had maltreated.

¹ See sect. 386 et seq.

² Haubold has effected a reconstruction, which has been inserted by our late colleague, M. Blondeau, in his collection of texts. We may also refer to

the work of Veyhe, *Libri tres edicti*, 1823.

³ Dig. 12, 6, *De cond. ind.*, 38, pr. f. Afric.; 19, 1, *De act. comp.*, 45, pr. f. Paul; 25, 3, *De agn. lib.*, 3, § 4, f. Ulp.; 30, *De legat.*, 1^o, 39, pr. f. Ulp.

JURISTS: TERENTIUS CLEMENS (frag. 35).

POMPONIUS (**SEXTUS POMPONIUS**, frag. 588). We are indebted to Pomponius for an abridgment of the History of Law, which is included in the Digest "*De origine juris et omnium magistratuum et successionem prudentium*;" and it is to these works which, though extremely brief and incomplete, that we must refer for the best information upon this subject.

L. VOLUSIUS MÆCIANUS (frag. 44) was, according to Capitolinus, the legal instructor of Marcus Aurelius.

A.D. 161. EMPERORS: MARCUS AURELIUS and LUCIUS VERUS (**M. AURELIUS ANTONINUS and L. VERUS, DIVI FRATRES**).

393. Marcus Aurelius was adopted by Antoninus and associated with Lucius Verus, his brother by adoption, who succeeded him in the empire. The virtues of Marcus tended to conceal the vices of Lucius, and the two are known as the "Divine Brothers" (*Divi Fratres*).

A.D. 169. EMPEROR: MARCUS AURELIUS.

JURISTS: PAPIRIUS JUSTUS (frag. 16).

TARRANTENUS PATERNUS. We have only two fragments taken from the works of this author, upon military matters (*Militarium libri quatuor*), which were incorporated in the Digest. We read in Lampridius (Commodus, § 4) that, being prætorian præfect under Commodus, he was put to death upon the charge of conspiracy against the life of this prince.

SCÆVOLA (**Q. CERVIDIUS**, frag. 307). Marcus Aurelius, according to Capitolinus, chiefly relied upon his advice; and we are told by Spartian (Caracalla, § 8) that he was the professor of Septimius Severus and Papinian.

Ulpius Marcellus (frag. 159) tells us that he was a member of the council of Marcus Aurelius (Dig. 28, 4, *De his qui*, 3), and, according to Dion Cassius (82—8), he became odious to Commodus, under whom he served in Britany, on account of his talents and his virtues.

GAIUS (frag. 535). This illustrious jurist is known to us only

under this name. It may be asked whether his name was Gaius Bassus, or Titus Gaius? This is, however, a useless inquiry: he is known to us as "Gaius," and whether his name was Gaius or Caius is a secondary consideration.¹ He lived under Antoninus Pius and Marcus Aurelius,² and perhaps, when still young, in the time of Adrian.³ We know from the title of the fragment which we have in the Digest, that he composed numerous works. He took a deep interest in legal history, and always endeavoured to trace things to their origin. The subjects upon which he wrote were not merely the Twelve Tables and the most important writings connected with Roman Law, the three edicts (*urbanum, ædilitium, provinciale*), and the *lex Papia*, but also the works of the Pontifex Maximus, Quintus Mucius Scævola, *qui jus civile primum constituit*, as we learn from him in his Institutes, in his *libris quos ex Quinto Mutio fecimus*. He prefaced his work upon the Twelve Tables with a short introduction, giving a historical *précis* of the history of Roman law from the foundation of the city.⁴ The compilers of Justinian's Digest gave the preference to the historical *précis* of Pomponius. Besides his *Institutiones* and his *Regulæ*, his Seven Books *Rerum quotidianarum* are so thoroughly practical that they received the epithet of *aurearum*.

By the side of the various conjectures made concerning his person and his life, we have certain unquestionable facts upon which dependance can be placed. Thus, strange to say, con-

¹ Quintilian, *Instit. orat.*, 1, 7: "Quid? Quæ scribuntur aliter quam enuntiantur? Nam et Gaius C. littera notatur."

² In the twelfth commentary of his Institutes, § 195, he applies the expression *divus* to Antoninus Pius, an epithet applied to those emperors who had been deified by the senate; he also adds the term *pius*, whereas in earlier portions of his work he calls him only Imperator Antoninus, whence we conclude that at this time Antoninus Pius must have been dead. "Sed nuper Imperator Antoninus," he says in par. 126, already quoted. "Sacratissimi principis nostri oratione" is the ex-

pression he uses elsewhere when speaking of the *senatus-consultum orphititanum*, referring to Marcus Aurelius.

³ Dig. 34, 5, *De rebus dubiis*, 7, pr. f. Gai.: "*Nostra quidem ætate Serapias, Alexandrina mulier, ad divum Hadrianum perducta est*," referring to a woman who had five children at a birth.

⁴ Dig. 1, 2, *De orig. jur.*, 1, f. Gai.: "Facturus legum vetustarum interpretationem, necessario prius ab Urbis initis repetendum existimavi; non quia velim verbosos commentarios facere; sed quod in omnibus rebus animadverto, id perfectum esse, quod ex omnibus suis partibus constaret."

sidering what the merits of Gaius as an author were, he is in no place mentioned either by the classical jurists or by the historians of his time.¹ We do not find that he enjoyed any of those honours and dignities which were conferred upon jurists in favour at the court of their prince, or with the Roman people, and in fact he describes himself in his Institutes as being a provincial.² Another singular fact is, that Gaius does not appear to have received the *jus respondendi*, or, according to the new form of expression in his time first mentioned by him, the permission *jura condere*. This may be deduced from certain expressions in the Constitution of Valentinian the Third and Theodosius the Second, Cod. Theod. 1, 4, *Lex de responsis prudentum*,³ A.D. 426.⁴ But from the time of this law, and in virtue of its provisions, Gaius figures as one of the five jurists who were specially accredited, and his writings became of the greatest importance in the development of Roman law.

This *Lex de responsis prudentum* is, in fact, the first document in which we meet with his name. It first made its appearance in the East, and was afterwards published in the West, so that it would seem that the merit of Gaius was not recognized till long after his decease, when a division of the empire and the transfer of the court to Constantinople had given to the East its great influence. This fact, together with the peculiar bent of his genius, and his acquaintance with Greek law, of which he gives ample evidence, is the basis of the opinion that he was of Greek origin. And it is from these facts that it has been supposed that he wrote and professed the law in some humble town of Asia Minor. Gaius, however, it must be admitted, wrote as a jurist profoundly intimate with his subject even to the most minute historic details of the existing legal documents, usages and the legal literature of the

¹ The Gaius mentioned in the Digest, 24, 8, *Solutio matrim.*, 59, f. Julian. (Sabinus dicebat. . . Gaius idem); 45, 8, *De stipul. servor.*, 39, f. Pomp. (Gaius *noster*, because Pomponius was a Cassian); 46, 8, *De solution.*, 78, f. Javol. ("in libris Gaii scriptum est"); refers to Gaius Cassius Longinus, more generally called Cassian.

² Gal., *Inst.*, ii. 7: "In provinciali

solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est vel Cæsaris; Nos autem possessionem tantum et usufructum habere videmur."

³ This law is always referred to by M. Ortolan as the *loi des citations*, and will be found *in extenso* in note 1, § 501.

⁴ See § 499.

Romans. This would suggest access to an extensive library possessing numerous manuscripts, which in his time were extremely difficult to obtain. He himself professes to have belonged to the school of the Sabinians. "*Nostri præceptores, diversæ scholæ auctores*," is a common expression with him ; so much so, that it is to him we are mainly indebted for acquaintance with the points of difference which existed between the two schools.¹

His elementary work, the "*Institutiones*," a title first adopted apparently by himself, enjoyed so much reputation that before the publication of Justinian's work it was regarded as the elementary text-book of legal study ; but it is impossible to say at what period this commenced. We observe that no mention whatever is made of him in the two compilations of the lower empire, *Fragmenta jur. rom. Vaticana*, *Consultatio veter. cuj. juriscons.* ; but in the third, *Collatio leg. Mos. et Rom.*, we find a somewhat lengthy passage from his first Institute relative to successions *ab intestato* according to the law of the Twelve Tables. There is also an abridgment of his *Institutiones* in the *lex Romanorum Visigothorum*, or *Breviarium Alarici*, A.D. 506.² And, finally, about the same period, the learned Boethius, the minister of Theodoric, in the kingdom of the Ostrogoths in Italy, who met with a violent death, A.D. 524, has inserted two extracts from his work ; the one upon *mancipatio*, the other upon the *in jure cessio*, in his commentary upon the *Topicis* of Cicero (lib. 3). This was the position in which we were as to the writings of Gaius when a discovery placed in our hands a most valuable document. In 1816, Niebuhr, while at Verona, discovered a palimpsest, that is to say, a manuscript of which the original writing had been obliterated or erased by some one, who, to save expense, had used the same parchment for other purposes. In 1817, Savigny first brought the existence of these palimpsests to light by an article in his journal ; and after some months of diligent and patient labour on the part of Messrs. Gæschen, Bekker and Bethmann-Hollweg, who had been employed by the Academy of Berlin to decipher these parch-

¹ Gai. *Inst.*, i. 196 ; ii. 15, 37, 79, 87, 98, 103, 133, 140, 141, 167, 178 ; iv. 123, 195, 200, 217—223, 231, 244 ; iii. 78, 79, 114, 163.

² Vide infra, § 531.

assassination." The reward which Papinian received for this reply was that Caracalla ordered his soldiers to slaughter him. This proof of heroism, if true,¹ is as honourable to Papinian as are any of his writings.

CLAUDIUS TRYPHONINUS (frag. 79).

A.D. 211. EMPERORS: ANTONINUS CARACALLA and GETA.

A.D. 212. ,, ANTONINUS CARACALLA (*Aurelius Antoninus Bassianus Caracalla*).

It is from the Gallic cloak—the cucullus or caracalla, in which he was so fond of wrapping himself, and of which he used to make presents to the people—that he received his surname Caracalla. His name was Bassianus; but he was officially called Antoninus, a name dear to the Roman people and the prætorian soldiers, and which had been conferred upon him by his father, Septimius Severus.

We would willingly pass over the five years of the reign of this sanguinary prince, were it not for the fact that he enacted a remarkable constitution which connects his name with the history of Roman law, and by which he extended the rights of citizenship to all the subjects of the empire, and for the fact that he effected considerable changes in the caducary laws. Before entering into an investigation of the effects of this institution, let us glance at the then existing condition of affairs.



SECTION LXXV.

THE *Jus Latii* AND THE *Jus Italicum* UNDER THE EMPERORS.

396. The emperors, who were the dispensers of the rights of citizenship, of Latinity, of Liberty and of Immunity, both as to towns and to country, who were the founders of colonies and the creators of *municipes*, granted their concessions

¹ The truth of this fact is questioned by the historians about this period. Nevertheless it is certain that Papinian

died by the order of Caracalla (Dion. Cass. lib. lxxvii. § 4; Spartianus, Caracall. 8; Aurelius Victor, Cæs., 20, 33).

according to their policy, their predilections or their weakness. Claudius, who was born at Lyons, and Trajan at Italica, near Seville, were favourably inclined, the one to Gaul and the other to Spain. Nero, who was crowned in Achaia, at the Olympic games on the race course, notwithstanding his fall and the abandonment of his race, conferred liberty upon that entire province, giving to its judges the rights of Roman citizenship.¹ Pliny, in his geographical tables of the then known world, gives an accurate description of the empire at the time of which he wrote. He takes great pains, when referring to the different towns and provinces, to point out the condition in which each was placed, specifying whether they were *Civium Romanorum*; *Latii jus*, or *Latinorum*; *Latii Veteris*, or *Latinorum Veterum*; *libera*, *immunis*, *fœderata*, or *stipendaria*; and also the *Colonia* and *Municipia*, with the number of each of the classes and of the rights which they respectively enjoyed.² We learn from him that Vespasian gave to all Spain the *jus Latii*, without prejudice, of course, to those colonies, municipia or other towns, then numerous, which enjoyed still greater privileges.³ On the other hand, Septimius Severus deprived the inhabitants of Neapolis, in Palestine, of the rights of citizenship, in order to punish them for having taken up arms in favour of his competitor Niger.⁴

397. Independently of its original signification, applied from the very first to the condition of the country itself, the expression *jus Latii*, *jus Veteris Latii*, had a personal as well as a local application, indicating alike the condition and the

¹ Suet., *Nero*, § 24: "Sed excussus curru, ac rursus repositus, quum perdurare non posset, destitit ante decursum; neque eo secius coronatus est. Decedens deinde, provinciam universam libertate donavit; simulque judices civitate Romana et pecunia grandi." Pliny, *Natur. histor.*, lib. iv. § 10: "Universæ Achaïæ libertatem Dominus Nero dedit."

² Pliny, *Natur. histor.*, lib. iii. et seq. The expression *jus Quiritium*, as synonymous with the rights of citizenship as applied to persons, is met with in

connection with Cornelius Bellus, who was born at Cadiz, and was the first foreigner to whom a triumph and the rights of citizenship had been conceded. "Uni huic omnium externo curru et Quiritium jure donato."

³ Ibid. lib. iii. § 4, in fine: "Universæ Hispaniæ Vespasianus imperator Augustus, jactatus procellis Reipublicæ, Latii jus tribuit."

⁴ "Neapolitanis etiam Palæstinensibus jus civitatis tulit, quod pro Nigro diu in armis fuerant." Spartian, *Life of Septimius Severus*, § 9.

capacities of individuals as to their participation, whether greater or less, in the rights of Roman citizenship; so that, by the jurists of the period to which we now refer, persons are classified according to this division: *Cives*, *Latini*, or *Peregrini*. This personal character is still more marked after the *lex Junia Norbana*, and the creation, under the style *Latini Juniani*, of a distinct class who were enfranchised by virtue of this law.

The *jus Italicum*, on the other hand, had a different destiny. It did not affect the personal status, so as to constitute a class. The word *Italici* is not to be met with in any of the jurists. But after the creation of the provinces on the one hand, and the termination of the social war on the other, with the extension of the rights of Roman citizenship to all Italy, when the distinction was drawn between the *ager provincialis* and the *ager Italicus*, the expression *jus Italicum* came into use, as indicating territorial status: it described the condition of land assimilated to Italian soil, the possessors of which enjoyed the *dominium ex jure Quiritium*, and were not subject, as were the occupants of the *ager provincialis*, to the payment of *vectigal*. The territory, moreover, was subject to the Roman civil law as regarded immovables, to *mancipatio*, *in jure cessio*, *usucapio*: in addition to which, residence in such territory conferred certain privileges,—as, for example, those attaching to the number of children a man had (*jus liberorum*); three children being the number fixed for residence in Rome, four in Italy, and five in the provinces. At a later period, when the Byzantine emperors wanted to give advantages to their new capital, they conferred upon it not only the *jus Italicum* but all the privileges of ancient Rome.¹

398. Savigny has clearly shown, in his dissertation upon this subject, the territorial character of the *jus Italicum* which we have just described; but what is still doubtful is whether, in the concessions made to certain colonies or to certain towns, the *jus Italicum* was not necessarily attended with certain effects as

¹ Cod. 11, 20, *De privilegiis urbis Constantinopolitanæ*, 1, const. Honor. et Theodos.: "Urbs Constantinopoli-

tana non solum juris italici, sed etiam ipsius Romæ veteris prærogativa lætetur."

to the condition of individuals, and whether the *jus Latii*, either in earlier or later times, granted to certain towns or countries, was not on its part followed by certain results affecting the condition of the land. The question is a difficult one, but we cannot admit any such proposition, at least as regards the period anterior to Caracalla. Pliny, in his geographical description of the Roman empire, only indicates towns or localities of small importance and few in number,—two in Spain and seven in Italy,—as having received the *jus Italicum*;¹ all the others, amongst which are the most considerable and the most highly privileged, are only designated by him, as we have already seen,² by the terms *Civium Romanorum*, *Latii veteris*, *Latii*, or by other similar expressions. It is indeed difficult to conceive that these towns received any concessions relative to their territory. On the other hand, Gaius, when he says that Troas, Berytus, and Dyrrachium possessed the *jus Italicum*, refers to the privileges conferred by the *Leges Julia et Papia*, and these laws have clearly a personal application.³ But from the time of the constitution of Caracalla a great change took place, which will shortly be explained; and from that time it is correct to say that the *jus Italicum* had exclusively a territorial signification.

399. Italy, though preserving its free towns, its *municipia*, and other institutions, finished under the emperors without having been converted into a province, by being consolidated, for the purposes of general administration, under the central direction of and subject to the rules of the imperial government. Adrian at this period had divided it into four parts, each under the administration of consular officials,⁴ who were, at a later date,

¹ Pliny, *Hist. natur.*, lib. iii. § 4: "Ex colonia Accitana, Gemellenses et Libisolina cognomine Foroaugustana, quibus duabus jus Italiæ datum." *Ibid.* § 25: "Jus Italicum habent eo conventu," etc. (Then follows a description of seven populations of Illyria to whom this right had been granted.) And again, we find in the fragments of Celsus, Gaius, Paul and Ulpian, in the Digest, lib. i. tit. 15, *De censibus*, intimations of many colonies, cities and territories, which had received the *jus*

Italicum for the most part after Pliny's time. See this subject dealt with under the head *De censibus* in the Digest of Justinian.

² Vide supra, § 396.

³ Dig., ut supra, 7, fr. G.

⁴ Spartian, *Adrian*, § 21: "Quatuor consulares per omnem Italiam judices constituit." J. Capitol., *Marc. Aur. Antonin.*, § 11: "Datis juridicis Italiæ consuluit, ad id exemplum quo Adrianus consulares viros reddere jura præcepit."

replaced by *correctores* or *præsides*, as in the provinces, and under Maximin it also lost its exemption from taxation.

SECTION LXXVI.

THE COLONIES AND MUNICIPIA UNDER THE EARLY EMPERORS —THE TABLES OF MALAGA.

400. The colonies were considerably increased in numbers under the early emperors. Not only the principal provinces, such as Gaul, Spain, Africa, and Greece, but countries situated at the greatest distance from Rome, had colonies established in them. The administration of these colonies, as well as that of the *municipia* or the federal towns, was framed upon the one common model,—on the principle of local civil organization and government, with such variations in matters of detail as were rendered necessary by peculiarities of custom or circumstances. It must not be overlooked that whereas, under the imperial rule, political rights in affairs of state were withdrawn almost entirely from the Romans themselves, the towns of the several provinces continued in the enjoyment of their municipal privileges, their *comitia*, their little senates, and their right of electing their own magistrates.

401. Two curious specimens of municipal law, belonging to the time of Domitian, were discovered in October, 1851, in the neighbourhood of Malaga. These two laws are written upon bronze tables, the one containing nine articles (xxi. to xxix.) of the municipal law of Salpensa, a small town in Spain, which has ceased to exist; the other, nineteen articles (li. to lxix.) of the municipal law of Malaga, which is placed by Pliny in the list of federal towns,¹ but which, in this table, is treated as a *municipium*. These two tables have formed the subject of several treatises, first in Spain, afterwards in Germany; and at a later period an interesting discussion took place between M. Laboulaye and

¹ Pliny, *Nat. hist.*, lib. iii. § 3: "Malaca, cum fluvio, fœderatorum."

M. Giraud as to their authenticity, a fact now no longer in dispute.¹

The *jus privatum* as it existed in the *municipia*, the law regulating their internal organization and administration, and the result of the transition of the municipal magistrates from their original condition to that of Roman citizens, have considerable light thrown upon them by the study of these tables. From article xxiii. of the table of Salpensa, we see that the *municipia* sometimes conferred upon the reigning emperor the dignity of *duumvir*, in order that he might send a præfect to exercise jurisdiction in his place, and article xxvii. establishes the right of *intercessio* between the municipal magistrates. Articles lii. to lix. of the table of Malaga treat of the convocation of the *comitia* and the manner of voting therein.



SECTION LXXVII.

THE RIGHTS OF CITIZENSHIP CONCEDED TO ALL THE SUBJECTS OF THE EMPIRE.

402. Such was the situation of affairs when Caracalla introduced a very considerable change in the personal status of individuals;—when he in fact conceded to all within the empire the rights of Roman citizenship. “*In orbe Romano qui sunt, ex constitutione imperatoris Antonini cives Romani effecti sunt,*” remarks Ulpian, as quoted in the Digest of Justinian.²

But, it may be asked, what were these rights of citizenship? and what was the condition of the Romans? It is said that from the passing of this constitution all subjects were Roman citizens; but might it not with equal justice be said that all Roman citizens were subjects? Without further inquiry into

¹ The first work is by Manuel Rodriguez de Berlanga, which contains the text and a commentary; it was published in 1853 at Malaga. Two other editions of the text, with notes, were published at Leipsic in 1855 by M. Mommsen and by M. Bussemaker. Another edition, by M. Henzen, came out in 1855 in the *Bolletino dell' Istituto di corrispondenza archeologica*. The last came out in France by M. Ed. Laboulaye

(*Les tables de bronze de Malaga et de Salpensa, traduites et annotées*), 1856, and by M. Ch. Giraud (*Les tables de Salpensa et de Malaga*), 1856; *Lex Malacitana*, 1868, by M. Asher of Heidelberg, which contains an interesting discussion on the authenticity of the two monuments.

² Dig. 1, 5, *De statu hominum*, 17, fr. Ulp.

this, however, it is clear that, as to the composition of families, the enjoyment of the *jus civile privatum*, imperial administration, and, in short, the formation of what is still called the "Roman people," and which was then nothing more than the agglomeration of all the conquered nations except the barbarians, this constitution of Caracalla was of importance.

403. We are far, however, from knowing what this constitution actually was. It is a remarkable fact that the historians of the time make little or no mention of it, whereas the historians of the republic never failed to mention even small towns to which the rights of citizenship had been accorded. What can be a stronger proof of the fact that the title of citizen had fallen in the public estimation under the emperors? Some doubts have also been raised as to the actual authorship of this constitution on account of the name Antoninus, a name to which all the emperors were partial, and which has induced some to ascribe it to Antoninus Pius.¹ But this is clearly an error. And we may rely upon the testimony of Dion Cassius, who explains the manner in which Caracalla, after exercising his ingenuity in inventing new forms of taxation, after having increased the duty upon enfranchisement, legacies and succession from a twentieth to a tenth,—in order to increase the amount produced by these taxes, which were only levied upon citizens,—increased the number of citizens, so that in fact that which was made to appear an act of grace and a concession, had no other object than to augment the revenue.² This is the satirical view of the ques-

¹ Justin., *Nov.* 78, 5, by which he suppressed all the differences between the enfranchised: "Facimus autem novum nihil, sed egregios ante nos imperatores sequimur. Sicut enim Antoninus Pius cognominatus (ex quo etiam ad nos appellatio hæc pervenit) jus Romanæ civitatis prius ab unoquoque subjectorum petitus et taliter ex iis qui vocantur peregrini, ad Romanam ingenuitatem deducens, hoc ille omnibus in commune subjectis donavit, Theodosius junior post Constantinum maximum sanctissimum hujus civitatis conditorem, filiorum prius jus petitum in commune dedit subjectis: sic etiam nos hoc videlicet regenerationis et auroorum

annulorum jus, unicuique petentium datum et damni et scrupulositatis præbens occasionem, et manumissorum indigens auctoritate, omnibus similiter subjectis ex hac lege damus: restitui-mus enim naturæ ingenuitate dignos, non per singulos de cætero, sed omnes deinceps qui libertatem a dominis meruerint, ut hanc magnam quamdam et generalem largitatem nostris subjectis adjiciamus."

² Dion Cassius, lib. lxxvii. § 9: "Cujus rei causa etiam omnibus qui in orbe Romano erant civitatem dedit, specie quidem ipsa eis honorem tribuens, sed revera ut fiscum suum augetet, quippe cum peregrini pleraque horum

tion, a view to which the historian, writing of such a prince as Caracalla, naturally inclines, and it was a matter deeply interesting, no doubt, to those who were affected by it; but the national influence which it exercised, by adding to the revenue, is the point of view from which we are interested in regarding it.

404. The extent also to which it affected persons is matter of controversy. The most natural interpretation which was originally accepted, that which most completely accords with a number of circumstances, and which we may safely adopt, is, that Caracalla gave in perpetuity and to all the subjects of the empire the title of citizens; that from this time there was no difference between the inhabitants of different parts of the empire, and that all except the "barbarians" enjoyed the rights of citizenship. We must add, however, and shall subsequently explain, that this reserve must be extended to certain enfranchised and condemned persons. Absolutism is never opposed to equality of civil rights when the civil rights are *nil*. Caracalla placed all upon a level, but that level was subjection to the imperial will.

405. This opinion, however, has not escaped criticism. For example, certain passages of Ulpian place it beyond doubt, that after Caracalla's time, and even under him, a distinction was still drawn between *cives* and *peregrini*.¹ In order to explain this, it has been said that Macrin, the successor of Caracalla, suppressed the enactment of Caracalla, and re-established the ancient order of things; this assertion has been founded on an expression of Dion Cassius.² But this explanation does not account for the existence of the distinction under Caracalla, who is said to have abolished it.

The theory now generally adopted, and which was first started by M. de Haubold,³ is that the constitution of Cara-

vegetalium non penderent." The provincials did not pay these imposts because, not being citizens, they could neither be heirs nor legatees under the civil law, and they could not make those enfranchisements which conferred upon the enfranchised the rights of citizenship.

¹ Ulp., *Regul.*, 17, § 1.

² The following is the translation of this sentence:—"He (Macrin) abolished the provisions of Caracalla concerning inheritances and enfranchisements." Dion Cassius, lib. lxxviii. 12.

³ Haubold: "Ex constitutione imp. Antonini quomodo qui in orbe Romano essent, *cives Romani effecti sunt*." Leipsic, 1819.

calla affected the empire as it existed at the time that it was enacted, and that consequently it gave the rights of citizenship to all then existing members of the empire, but not to those who were subsequently annexed.

We cannot adopt this opinion. We do not think it possible that this constitution extended to the enfranchised nor to those who had been condemned to any penalty producing a *capitis diminutio*. In our opinion these persons were in no way included in the constitution of Caracalla. It could not be contended that there were not, after the constitution of Caracalla, enfranchised *dedititii* or *Latini Juniani*. The *leges Ælia Sentia* and *Junia Norbana* continued in force, and the distinction between the enfranchised was not suppressed till the time of Justinian.¹ But that the constitution of Caracalla was intended to affect those enfranchised who were in existence at the time of its promulgation is a matter that I consider extremely doubtful. The laws of enfranchisement appear to me to be quite beyond the scope of the provisions of this constitution. Nor would it be contended that persons condemned, subsequently to the constitution of Caracalla, to penalties which involved the loss of the rights of citizenship, did not continue to incur this loss. And that the constitution of Caracalla included even the condemned then existing, so as by an act of grace to grant them a *restitutio in integrum*, I cannot for one moment believe. The penal law seems still farther beyond the scope of the constitution of Caracalla.

406. The chief difficulty we have to determine concerning newly-acquired territories, which had been annexed under the empire, is whether the status of citizen was communicated to the inhabitants by the mere fact of the annexation of their territory, or whether, in cases where this annexation was subsequent to the constitution of Caracalla, the inhabitants remained in the condition of *peregrini subjecti*. Apart, in fact, from the conquest of kingdoms subsequent to the constitution, conquests which were carried into the most distant parts, that which

¹ Inst. 1, 5, *De libertinis*, § 3; Cod. 7, 5, *De deditit. libert.*, and 6, *De latin. libert.*; Nov. 78.

was with pride named the Roman world was already in existence in the time of Caracalla, and it is to this vast world (*in orbe Romano qui sunt*) that this constitution of the emperor applies. In fact, in the courts of the East, no distinction was drawn between subjects and citizens; every subject of the empire had the right of citizenship. Whence came this change, if it did not spring from the constitution of Caracalla? Can it be ascribed solely to the transfer of the seat of empire from Rome to Byzantium, or to mere disuetude, while there was upon this very subject specific legislation? About eighty years after the constitution of Caracalla, Ælius Spartianus, in writing the life of Septimius Severus, says that he was of African origin, that he came from the *municipium* of Leptis, now Tripoli; but that his ancestors were Roman knights before the time when the rights of citizenship were conferred upon all (*ante civitatem omnibus datam*), and it is the Emperor Diocletian that the historian is addressing.¹ Justinian says that, whereas Caracalla accorded to all the rights of citizenship, Theodosius granted them those that had been reserved to persons having children, and that he conferred upon all the enfranchised the title of citizen. Does not this indicate that the constitution of Caracalla was definitive and general? Would he have compared it to that of Theodosius and to his own had it been intended only for the then existing inhabitants, and not for those who in later times might be added?

407. Is there anything to be wondered at in the difference which was always made between *cives* and *peregrini*? Without considering the enfranchised and those who had been convicted of crimes which deprived them of the rights of citizenship, is it not correct to say that the distinction never for one moment ceased to exist, and that it was individuals alone who changed their position? The subjects of the empire, people of the Roman provinces who were hitherto *peregrini*, had become citizens, and the class *peregrini* thenceforward consisted solely of those who were in fact strangers to Rome, the barbarians,

¹ "Severus Africa oriundus imperium obtinuit: cui civitas Leptis, pater Geta, majores equites Romani ante

civitatem omnibus datum." Spartian, *Life of Sept. Severus*, § 1.

mercenaries in the pay of the emperor, who located on the furthest frontiers, received land in order to defend it, with whom there was an incessant struggle still being carried on, and who were certainly not at that time subjects of the empire. The idea formerly attached by the Romans to the word *peregrinus* was thus changed a second time. Sidonius Apollinarius, in the fifth century, says, in somewhat emphatic language, "Rome, the capital of the entire world, in which no one is *peregrinus* but the barbarian and the slave."¹

408. From the time of the constitution of Caracalla, the title of "Roman," which had long ceased to be a word designating a race, and which had become a political term, was extended to all within the limits of the empire. The toga was worn everywhere; the *gens togata* included every variety of the human race,—in fact the greater part of the inhabitants of the then known world; and it was all these races, who, before their union with the empire, were barbarians, that orators would address as "Quirites!" With this word Alexander Severus in Syria caused the mutinied legion of Daphne, a legion of Asiatics, to lay down its arms, as Julius Cæsar had already done in Rome with one of his own legions.²

409. Such are the principal legal effects of this constitution. We need not refer to other contracts or institutions connected with the civil law which were confined to pecuniary interests, to the *connubium* or the right of forming legitimate marriages, called by the Romans *justæ nuptiæ*, which had become common amongst the whole population of the empire, the general effect of which may be described in the language of the Spanish poet.³

"Distantes regione plagæ divisaque ponto
Littora conveniunt . . .
Nam per genialia fulcra
Externi ad jus connubii; nam sanguine mixto
Texitur, alternis ex gentibus, una propago."

The Roman armies were no longer recruited for slavery

¹ "(Romam) domicilium legum, gymnasium litterarum, curiam dignitatum, verticem mundi, patriam libertatis, in qua totius mundi civitate soli Barbari et servi peregrinantur!" Sidonius Apollinarius, *epist.* 1, 6.

² "Quirites, discedite, atque arma deponite." Lampridius, *Life of Alex. Sev.*, § 53; Suet., *Life of J. Cæsar*, § 70.

³ Prudentius (a native of Tarraconensis), v. 348.

amongst those populations, the members of which were all now Roman citizens. Obstinate revolts doubtless took place in exceptional situations, when, as the result of war or sedition in the provinces, slavery was the fate of the captives; but from the time of Caracalla, the franchise became an absolute right. Roman slaves were for the future only obtainable from amongst barbarians beyond the frontiers of the Rhine, the Danube, of Asia Minor, or of Africa. This constitution in one word gave freedom to the greater part of the then known world.

In fact, from the date of this constitution, provincials throughout the empire became eligible to the ranks of the army, a privilege heretofore exceptional, and one which was solely the result of personal concession, for it had been the standing rule that the *peregrini* and the barbarians could not form a portion of the legions proper, but acted merely as auxiliaries. After the constitution of Caracalla, therefore, all the provincials transformed into citizens could become legionaries, and thenceforth regular recruiting took place in each province.¹ This constitution, therefore, materially augmented the military resources of the empire. But the condition of the Roman legion, both at this period and subsequently, was that of the general population of the empire—a *mélange* of nations bound together by the will of a single individual and glorying in the title of “Romans.”

410. It must not be overlooked that the constitution of Caracalla, which gave to all the subjects of the empire the rights of citizenship, did not give to all the territories the rights of *ager Romanus*. In elevating all the people, it did not elevate all the soil to the same civic status; it would not have answered the purpose of Caracalla to have released the land from tribute or *vectigal*. The *solum Italicum*, and the lands belonging to those towns whose territory had been admitted to the enjoyment of civic rights, still remained distinct from the *solum provinciale*, and this distinction was maintained till the time of Justinian.² But from the time of the constitution of Caracalla, all subjects

¹ “Supplementa legionibus scripta sunt, indictis per provincias tirociniiis.” Ammian. Marcellinus, speaking of the

time of Constantius, lib. 24, § 6.

² Cod. 7, 25, *De nud. jur. Quir.*; 7, 81, *De usuacap. transform.*

were citizens; the differences between the rights of citizenship, of *Latini veteris* or *Latini*, in the colonies, *municipia* and all other towns or villages, was entirely effaced, so far as concerned the status of persons. The *Jus Italicum* from this time was exclusively territorial.



SECTION LXXVIII.

THE MODIFICATION OF THE LEGES JULIA AND PAPIA POPPÆA —THE RIGHTS OF THE FISCUS IN CLAIMS UPON CADUCA.

411. The same observation as that already made equally applies to another constitution of Caracalla, which is briefly indicated to us, like the last, by Ulpian, and like the last its scope and bearing are equally subjects of controversy; this is the caducary law, concerning which Ulpian says, "*Hodie ex constitutione imperatoris Antonini omnia caduca fisco vindicantur.*"¹

412. Our older writers upon Roman law having only a vague notion of what could be meant by *præmia patrum*, mentioned in Roman literature and several fragments of the jurists, and imagining that the provisions concerning the *caduca* were intended by the *leges Julia* and *Papia* to apply directly to the public treasury, were much embarrassed by this fragment of Ulpian. They could do no more than question the accuracy of the manuscripts, like Cujas, who, when commenting upon these words, "*Hodie ex constitutione imp. Antonini,*" wrote "*Imo, ex lege Papia,*" and who endeavoured by a transposition of the text to apply this constitution to another point.² Or else they limited the operation of this constitution to a mere change in the financial administration made by the Emperor Caracalla, in order to make a transfer from the *ærarium* or public treasury to the *fiscus* or imperial treasury. Such is the sense in which Pothier, who conforms to the more advanced

¹ Vide supra, § 377; Ulp., *Reg.*, tit. 17, *De caducis*, § 2.

² Cujas, *Notes on tit. 17 of Ulpian.*

interpretation of J. Godefroy and of Heineccius, understood it, as expressed in these terms, "*Caduca igitur ex illa lege ærario Populi Romani cedebant. Hodie ex constitutione imp. Antonini omnia caduca fisco vindicantur.*"¹

413. Since, however, we have become acquainted with the Institutes of Gaius, and since we have learned how by the *lex Papia* those who had children (*qui in eo testamento liberos habent*), as a reward for paternity, were permitted to claim the *caduca*, the order in which these persons were called, and how the public treasury was only admitted in default of such persons, the true sense of the constitution of Caracalla has become clear. This emperor, who was notorious for cruelty, and at the same time has left behind him a reputation as a fiscal administrator, deprived paternity of its privilege, and gave to the *fiscus* the entire claim upon the *caduca*. He had doubled the impost upon inheritance, legacies, *donationes mortis causæ* (*vicesima hæreditatum*), as also that upon enfranchisements. He filled his treasury by giving to the *fiscus* all the *caduca*. The *cælebes* and the married who had no children were in all cases punished, but the parent was not recompensed. The caducary laws became exclusively fiscal. Caracalla, in his claim upon the *caduca*, only respected the right conferred upon the ascendants or descendants of the testator of the *jus antiquum* preserved to them by the *leges Julia et Papia*.² And this explains the fragment of Ulpian: "*Hodie ex constitutione imperatoris Antonini omnia caduca fisco vindicantur, sed servato jure antiquo liberis et parentibus.*"

414. This effect of the constitution of Caracalla explains the other singular fact that in no part of the fragments of contemporaneous jurists,—such, for instance, as the *Regulæ* of Ulpian and the *Sententiæ* of Paul, nor in the fragments of a later period,—is there to be found any mention of the order in which the *caduca* were theretofore claimed by parents, nor

¹ The *caduca* therefore by that law went to the *ærarium*; but now, by the

constitution of Antoninus, the whole *caduca* passes to the *fiscus*.

² Vide § 376.

any precise indication of what this claim actually was; so that our principal interpreters of Roman law either remained in error or in vague uncertainty. And in fact it was necessary in order to initiate ourselves into these mysteries to await the discovery of the Institutes of Gaius, that is to say, the writings of a jurist who had died before the commencement of the reign of Caracalla.

415. However there are some slight indications or vestiges of these obliterated rights still extant in certain texts which we are justified in assuming as posterior to the constitution of Caracalla; such as are to be found even in the work of Ulpian, where reference is made to this constitution.¹ So doubtful, however, are these references that they have given rise to the following objections. How could there still be any question as to the rights of parents to claim the *caduca* if it is true that they had been withdrawn by Caracalla? Is it not clear, from this evidence alone, that we must seek some other interpretation for this constitution? Opinions, in some respects, resemble the fashions. Authors like to make their appearance in some novel costume, different from other men. And the reappearance of a garment that has been for some time laid by is tantamount to a novelty. The interpretation which our ancestors were forced to adopt, for want of the information which

¹ *Regula*, Ulpian, tit. 1, *De libertis*, § 21: "Quod loco non aduentis legatarii patres heredes fiunt." Cujas, being unable to understand this text, proposed to read it, "*Praefecti aerarii heredes fiunt.*" Ibid. tit. 25, *De fideicommissis*: "Nec caducum vindicare ex eo testamento, si liberos habeat." He proposed to read, "Si ex liberis existat." This double mention of the privilege of paternity as to claims for *caduca* is the only reference to it in the *Regula* of Ulpian. The allusions are in each case merely incidental, the one being introduced in connection with the question of validity in the case of controverted enfranchisements, in which Ulpian sets forth the points in controversy; the other in reference to a prior *senatus-consultum*. But when the jurist is actually treating of the sub-

ject, under the title *De caducis*, he does not make the slightest mention of the rights of parents, and only refers to the claim concerning *caduca* in order to say that it belongs entirely to the *fiscus*, saving the rights of ascendants and descendants who enjoy the *jus antiquum*.

The other text offers an objection in par. 3 of "*Fragmentum veteris cujusdam jurisconsulti, De jure fisci*: . . . Sane si post diem centesimum patres caducum vindicent omnino fisco locus non est." This text is commonly supposed to be by Paul; some suppose it to be by Ulpian or by some other jurist. However, as it is impossible to say whether this is anterior or posterior to the constitution of Caracalla, it ought not to be allowed as an objection. In our opinion it is anterior.

we now possess, has reappeared under the form of the objection we have just set forth. And we again find it said, that the innovation made by Caracalla was limited to granting the claim upon the *caduca* to the *fiscus* instead of to the *ærarium*.

416. This is an interpretation which we cannot accept, notwithstanding the authority of the writers who give credit to it. Its inaccuracy is apparent.

In the first place, it appears to us clearly demonstrated that, before the constitution of Caracalla, the distinction between the *ærarium* and the *fiscus*, though subsisting in theory and as a matter of personal administration, was in reality nonexistent. And that, especially as regarded the *caduca*, that which fell to the *ærarium* heretofore is now specifically stated to belong to the *fiscus*.¹ Whereas, on the other hand, even after the constitution of Caracalla, we find the principle of a difference existing between the rights of the people and those of the *fiscus*

¹ This is plain from the edict of Trajan upon the premium to be awarded to those who should themselves declare their incapacity to benefit from the *caduca*. If we rely upon Paul's rendering of the terms—"Ut si quis, antequam causa ejus ærarium deferatur professus esset eam rem quam possideret capere sibi non licere ex ea partem fisco inferret, etc. Et probasset jam id ad fiscum pertinere . . . ex eo quod redactum esset a Præfectis ærario partem dimidiam ferat" (Dig. 49, 14, *De jure fisci*, 13, pr. and § 1)—in a rescript of Adrian (ibid. § 4), and in a *senatus-consultum* preserved by Junius Mauritianus, who wrote under Marcus Aurelius: "Senatus censuit ut perinde rationes ad ærarium deferat is a quo tota hæreditas fisco evicta est, vel universa legata" (ibid. 15, § 5). All these texts are taken from treatises upon the *leges Julia et Papia*. No one can say that the word *fiscus* has been substituted by Tribonian for *ærarium*, inasmuch as the two words are used at the same time, in the same phrase, and in the same provision. We may conclude from these texts that already, under Trajan, under Adrian, and under Marcus Aurelius, proceedings took place before the *præfectus*

ærarii; but it was the *fiscus* that was proprietor, which made the claim, and which received the portion on the score of the *caduca*. The *fiscus* appears as exercising the same right in the fragments that we possess of jurists anterior to Caracalla (Dig. 30, *De legat.*, 96, § 1); Gaius (Dig. 49, 14, *De jure fisci*, 14); Junius Mauritianus (ibid. 15, § 5; and in a decree and constitution of Septimius Severus, *Circa delationes fiscales*, mentioned by Ulpian (ibid. 25). It is easy to say that it is Tribonian who has used the word *fiscus* instead of *ærarium* in every place in his fragments; but how does it happen that in the very chapter, *De jure fisci*, he so frequently employs the word *ærarium*, which is to be met with in almost every paragraph in a text of Junius Mauritianus (ibid. 15, §§ 1, 3, 4, 5, 6), and in another of Valens (ibid. 42). And, besides, even in the time of Justinian this practice of substitution was prevalent, for we find in the text of a constitution of that emperor the two words used as synonymous: "Bene a Zenone divæ memoriæ *fiscalibus* alienationibus prospectum est, ne homines qui ex nostro *ærario* donationis vel emptionis . . . accipiunt?"

distinctly enunciated, which proves that the constitution of Caracalla had not suppressed it. The fact is, that after the principle was admitted by the emperor that the people by the law of investiture transferred to the emperor all their powers and all their rights, it remained the custom to speak of the "rights of the people," but this was equivalent to saying the "rights of the prince." For, though preserving the duality of terms and the notion of personal administration, the *fiscus* was the sole reality.

In the second place, in order to sustain this strained interpretation we must not only suppose interpolation on the part of Tribonian in a great number of the texts of the Digest, but must warp the phrase of Ulpian in order to turn it from its natural meaning, and by so doing destroy the connection.

In the third place, we should try in vain to rearrange that sentence. In any attempt to punctuate and twist it according to our fancy, to make its parts undergo the exercises to which a clown submits his limbs, there will always be found a word which will baffle our best endeavours, the word *omnia*. This *omnia* is of itself a rock on which is wrecked the strained interpretation. "*Omnia, sed servato jure antiquo liberis et parentibus,*" can be well understood, and is perfectly correct if the constitution of Caracalla suppressed the rights of the *patres* in claiming the *caduca*; but if it maintained them it becomes radically false; the treasury does not claim all the *caduca*, since, before it, come the claims of a whole series of persons having children beneficiaries under the same will. Can anyone pretend to say that the word *omnia* only concerns arrangements between the *ararium* and the *fiscus*? Then there must formerly have been a division of the *caduca* between the two, the treasury thenceforth taking the whole: this is nothing but hypothesis. Suppose we accept the hypothesis, in what position is the jurist, who has the reputation for logical accuracy? He is treating of the subject *de caducis*, and gives in his first paragraph the detailed definition of the *caduca*, and then immediately adds, in his second paragraph, "*Hodie omnia caduca fisco vindicantur,*" without any indication or warning that there is a whole series of persons enjoying the rights of

paternity, whose claims come before that of the treasury, as if they had no existence? Let us assume, on the contrary, that those rights of paternity, at the moment to which that *hodie* refers, were suppressed, and the difficulty disappears.

417. It remains, however, for us to say a word about the objection by which this lame interpretation is supported. We do not speak of the fragment *De jure fisci*, as there is nothing to authorize us in placing it posterior to the constitution of Caracalla, but of the two paragraphs taken from the *Regulæ* of Ulpian, in which can still be read the mention of the right of the *patres* to the claim for the *caduca*. As to those two paragraphs we might confine ourselves to pointing out the incidental character, already noticed, of the allusion and the forced manner, so to speak, in which this incidental mention has been historically brought in. That would, perhaps, be the best explanation. We must be, however, permitted to make one conjecture which, among so many others, is perfectly allowable. It is very well known that Ulpian, as well as Paul, assessor of Papinian, who had already earned distinction under Septimius Severus, and whose life was prolonged to the time of Alexander, had written before as well as during and after the reign of Caracalla. Let us suppose his manuscript of the *Regulæ* to have been composed before the constitution of that prince; this constitution is then enacted, the author effaces in the special title *De caducis* what he had said of the rights of the *patres*, and writes: "*Hodie ex constitutione imperatoris Antonini omnia caduca fisco vindicantur, salvo jure antiquo liberis et parentibus.*" Perhaps, also, he makes the same suppression in certain passages of some importance, but in two isolated paragraphs there remains the incidental mention of that right, although suppressed, and it is in this condition that the manuscript reproduced by the copyists is put into circulation. These are accidents which even with us moderns, who enjoy the art of printing and the power of bringing out new editions, frequently occur with respect to new laws that suddenly change old systems: without mentioning old editions kept in use subsequently to these changes, on which the corrections

are only made with the help of references or tables of errata. Now, the ancients had not even that remedy; their corrections had to be made by the hand, as we do ours on our manuscripts or on the margin of our books. However this conjecture may be received, everybody will admit that if the right of the *patres* to the claim of the *caduca* was still in existence at the time when Ulpian brought out his *Regulæ*, the place to treat of it was not that in which there might be an incidental and purely nominal mention of it, but in a prominent position under the title *De caducis*, after the detailed definition given by Ulpian of what was understood by *caduca* and before the claim of the treasury was alluded to, since that claim only came in for want of the *patres*. It is impossible to explain otherwise than by the suppression of these rights of *patres*, how it happens that Ulpian, who wrote twenty books on the *leges Julia et Papia*, preserves an absolute silence on the subject at the very place in his *Regulæ* where it was indispensable to speak of them; how Paul, who wrote ten books on the same laws, preserves in his *Sententiæ* the same silence under the headings which most strongly suggested their mention, as those on the institution of heirs, upon legacies and upon *fideicommissa*. This suppression, by the constitution of Caracalla, is therefore demonstrated, as it appears to us.

418. But the question may be asked, whether it was of permanent duration, or whether it was not revoked subsequently to the reign of Caracalla? This is a point in the history of law on which, for want of sufficient documentary evidence, it is impossible to assert anything. There are a few words taken from the *Novellæ* of Justinian, announcing the abolition of the last vestiges of the legislation on the *caduca*, which might suggest the belief that the right of the *patres* had existed until that time; as for ourselves, we can scarcely accept such as the fact; we interpret in a different way the *Novellæ* of Justinian, and yet we are inclined to suppose, without being certain of it, that the fiscal innovation of Caracalla did not survive him long. Dion Cassius has said of Macrin, his successor, that he abolished the provisions of

Caracalla as to inheritances and enfranchisement.¹ Although the historian here alludes to the tax of the twentieth, which Caracalla had doubled, and which Macrin brought back to its primitive rate, we may be allowed to give that sentence a more general sense and to view it as comprising also the provisions relating to inhabitants and to *caducary* legacies. Macrin was the assassin of Caracalla; it was necessary for him to gain popularity at his expense. Everybody knew Caracalla had been poniarded. The reign of Macrin, short as it was, was a reactionary period as regarded his predecessor. He was somewhat versed in the law; he had been consul for the treasury, procurator of the *ærarium*, and he used to say that it was shameful to consider as laws the orders of a Commodus and a Caracalla.² It is not therefore without probability that among the provisions of Caracalla on inheritances, which he abolished, were comprised those relating to institutions and to caducary legacies, in which matters he very likely had, as well as in the tax of the twentieth, restored the old law. There is another emperor as to whom, in default of Macrin, a similar supposition is also admissible, and that is Alexander Severus, who, Lampridius tells us, sanctioned a great number of laws, characterized by moderation, on the rights of the treasury and of the people.³ If we consider how onerous and intolerable must have been that claim of all the *caduca* by the treasury in testamentary successions, we shall not be astonished to find that everybody was impatient to be freed from it. With the entire disqualification of every person not actually married, plus the liability to disqualification of one-half of all persons married but having no children, plus the other causes of liability to disqualification or *quasi* liability,—and taking into consideration the fact of the treasury setting aside, for those portions *caduca* or *quasi caduca*, everyone, even those who had children, with the exception of the ancestors or the descendants to the third degree, and appropriating them all for itself,—there was no longer any security for

¹ Vide § 405 and reference.

² J. Capitolinus, *Life of Macrinus*, § 4 and § 13: "Nefas esse dicens leges videri Commodi et Caracallæ et hominum imperitorum voluntates." Lam-

pridius, *Life of Diadumenianus*, § 4.

³ Lampridius, *Life of Alexander Severus*, § 15: "Leges de jure populi et fisci moderatas et infinitas sanxit."

any testator. A dissolution of marriage, the death of a child, of an appointed heir or of a legatee, baffled the precautions taken by the testator, and swept the inheritances down into the gulf of the treasury. It was not without danger that they confined their testamentary gifts to the nearest relatives who enjoyed the exception, or even to ancestors or descendants who enjoyed the *jus antiquum*; their death before the opening of the will, or their refusal, would also open that gulf. Indeed, with that gulf before them the best way was to remain intestate. And a great restriction in the use of wills, to which the Romans were so attached, could not fail to be the result of the caducary laws, aggravated by the power of the treasury. Such is the body of reasons which even, in the absence of any formal document, makes us believe that this fiscal absorption, conceived by Caracalla, was only temporary, and did not escape the rescinding power of his immediate successors. It is to another period, that of the Christian legislation inaugurated by Constantine, that it appears to us more conformable with the general course of events to attribute at once the suppression of the penalty imposed on celibacy and on the misfortune of not having children, a suppression for which we possess an express constitution, and the complete disappearance of the privilege of the *patres* in the claim to the *caduca*.¹

JURISTS: VENULEIUS SATURNINUS (frag. 71).

419. ULPIAN and PAUL (Domitius Ulpianus, frag. 2462); (Julius Paulus, frag. 2083). The former was a native of Tyre, the latter of Padua. Rivals in talent and in fame, both lived in the time of Papinian, whose assessors they both were; both ascended through the various dignities of the empire to the post of prætorian præfect. Both composed several works, which were laid under contribution by the compilers of the Pandects, and critical notes on the books of Papinian, which, later, were rescinded by two imperial constitutions and denuded of all authority. Each wrote an elementary work, fragments of which have reached us, and which, taking their place by the side

¹ Vide § 480.

of the Institutes of Gaius, constitute the sources whence we must study the jurisprudence of that time. The work of Ulpian bears the name of *Liber singularis regularum Ulpiani*, or simply *Fragmenta Ulpiani*; that of Paul is entitled *Julii Pauli sententiarum receptarum libri V*, or simply *Pauli sententiarum libri V*.

JURISTS: Callistratus (frag. 99).

Ælius Marcianus (frag. 275).

Florentinus (frag. 42).

Æmilius Macer (frag. 62).

Herennius Modestinus (frag. 345).

EMPERORS.

A.D. 217. **MACRINUS** (OPILIUS MACRINUS).

„ 218. **HELIOGABALUS** (M. AURELIUS ANTONINUS, *cognomine* HELIOGABALUS).

„ 222. **ALEXANDER SEVERUS** (AURELIUS ALEXANDER SEVERUS).

490. Having attained the empire at the age of sixteen, Alexander Severus surrounded himself with wise counsellors and illustrious jurists, among whom was Ulpian. He kept alive for a few years longer the influence of literature, the sciences and the law, which after him disappeared for a long time. And therefore those who confine their study of the law to the law itself, without tracing its connection with political events, mark his death as the advent of a new period. And, indeed, it was under the emperors whose names we have just perused,—under the protection of Adrian, of Antoninus Pius, of Marcus Aurelius, of Septimius Severus,—that the study of jurisprudence reached its highest pitch. The jurists were multiplying and so were their disciples. It was no longer by simply following the practice of the bar that the latter trained themselves, but oral lessons had developed in a series of lectures the principles of the science.¹ Perhaps the professors, whose lessons had at first been paid for only by the pupils themselves, already received fees from the public treasury, and Marcus Aurelius, who created public professorships for eloquence and for philosophy, had per-

¹ Vide § 347.

haps done the same for law. New works came out every day; they were commentaries on the edicts of the prætors or of the proconsuls (*ad edictum* ; *ad edictum provinciale*); treatises on the functions of the magistrates (*De officio præfecti urbi, proconsulis, &c.*); extensive works on the whole body of law (*Digesta, Pandectæ*); or, lastly, abridgments, elementary lessons (*Institutiones, Regulæ, Sententiæ*). The jurists rose to the highest offices; they were counsellors of the emperor, consuls, prætorian præfects, præfects of the city. But all at once, after Alexander Severus, the series appears to us abruptly interrupted, and for a long time we meet in history with little else than military seditions of the worst kind, emperors reigning for a few months, made to-day, unmade to-morrow; armies fight in support of their respective candidates; and thirty pretenders to the empire in the course of a few years appear and destroy each other.

EMPERORS.

A.D. 235. MAXIMIN (*Julius Maximinus*).

„ 237. GORDIAN 1st and GORDIAN 2nd (GORDIANUS I. and II.).

(Less than two months after) MAXIMUS PAPIENUS and BALBINUS.

„ 238. GORDIAN 3rd.

„ 244. PHILIP (PHILIPPUS ARABS). PHILIPPUS the elder, *Augustus*; PHILIPPUS the younger, *Cæsar*.

„ 249. DECIUS.

„ 251. GALLIUS HOSTILIUS and VOLUSIUS.

„ 253. ÆMILIANUS.

(Three months afterwards) LICINIUS VALERIANUS and GALLIENUS.

The same and VALERIANUS 2nd, *Cæsar*.

(It was at this epoch that the pretenders began to appear, who soon, to the number of thirty, spread civil war on all sides of the empire and finished by killing each other.)

A.D. 260. GALLIENUS, alone.

„ 268. CLAUDIUS 2nd (M. CLAUDIUS).

„ 270. AURELIANUS.

„ 275. TACITUS.

A.D. 276. FLORIANUS.

(Three months after) PROBUS.

„ 282. CARUS, CARINUS and NUMERIANUS.

„ 283. CARINUS and NUMERIANUS, alone.

421. In the midst of this rapid succession of princes, the eye of the historian must be directed to two great events, which cannot be placed under any reign in particular, because they were daily developing themselves. They are the propagation of the Christian religion and the irruptions of the barbarians.



SECTION LXXIX.

THE PROPAGATION OF CHRISTIANITY.

422. In the reign of Tiberius, the apostles, traversing the provinces of the empire, had spread everywhere around them the new religion which they preached. This system of pure morality, with its grand conception of the Deity, struck the minds and covered with shame and ridicule the religious system and the gods of paganism. As a faith, polytheism, already abandoned by philosophy and by the higher classes of Roman society, was disappearing day by day. It no longer existed except as an institution, as an external worship, in the habits and practices of public and of private life. The creed of the apostles, which was destined to bring about the greatest social revolution, not through force, but through the mind and through the feelings, attracted the small as well as the great, the weak as well as the strong, the poor as well as the rich. The number of persons who connected themselves with it rapidly increased; the churches in which they assembled multiplied; everything contributed, as regards private life, to propagate the Christian religion. Was it the same with the government?

423. This point has not been sufficiently considered with respect to political laws. Hitherto we have shown the *jus sacrum* of Rome as firmly attached to the *jus publicum*, and forming an important portion of that system. The pontiffs were

magistrates of the people, named in the elections as the other magistrates, interfering by virtue of their functions in the highest affairs of the state; the first officer of the *jus publicum*, the emperor, was also the first of the *jus sacrum*, the sovereign pontiff. The unity of the *jus sacrum* was not less essential to the government than the unity of the *jus publicum*, for the two were intimately connected. This unity had always been secured by the very plurality of the divinities. When a province newly added to Rome had new divinities, they were received, they had altars raised to them, they had priests appointed to them, and the religious system was not affected for a single moment. The deities of paganism were accommodating. But when a religion appeared which, revealing the existence of a One Infinite God, could not be received without annihilating all the existing institutions,—a religion which made priests independently of the choice of civil authorities, which separated itself entirely from public power, and which said: “My empire is not of this world, but of another,”—the *jus publicum* was attacked in one of its fundamental bases. The chiefs of the government were obliged either to defend their system or to change it totally; they adopted the first of those two expedients. However absurd polytheism may be, mankind does not so easily break off from error, especially when the government of a great empire is connected with this error. As rulers and as sovereign pontiffs, the emperors wished to suppress a religion which threatened the existence of the state, and, to accomplish their design, they adopted the most fatal course, that of force and of cruelty, which after all was suggested to most of them by their own ferocious disposition. The persecutions of Nero, of Domitian, of Verus, and of Gallus, only made martyrs; the Christians multiplied in the midst of sufferings; the light of religion shone more brilliantly and attracted more respect, and before long the inhabitants of that vast empire were divided into two large classes,—the Christians and the pagans. When a war, a pestilence, or any scourge fell upon the empire, the pagans never failed to attribute it to the fatal innovations of the Christians, and the latter to cast the blame of it on the blindness and on the obstinacy of the pagans.

424. The jurists who were attached to the existing law and institutions were, in the struggle against rising Christianity, the auxiliaries of the chiefs of the government, and often their ministers or depositaries of public powers. Their philosophy, which had come from Greece, which had been naturalized in Rome, and had been cultivated by them as the mother of all sciences, had progressively substituted for the Quiritarian civil law, which was a materialistic system exclusively adapted to Roman citizens, a system more rational, more liberal, and which was open to all men; but it had done this with the help of ingenious constructions, which, while ostensibly upholding civil law, contrived to push it aside and take its place, while at the time they appeared only to be running parallel with it. Christianity was in their eyes an enemy to the state and its institutions that required to be combated; perhaps a rival of their philosophy which, by the very strength of its simplicity, it was destined radically to destroy. It is however quite intelligible that the light of the new system was infusing itself throughout the old, without the adherents of the latter being at all conscious of any such influence, and that the principles of the Gospel were indirectly penetrating their systems of philosophy, and that even when persecuted and proscribed, Christianity had a liberalizing and softening influence on the progress of jurisprudence and of legislation.

SECTION LXXX.

THE IRRUPTION OF THE BARBARIANS.

425. The Romans, driving before them the savage tribes of the forests of Germany and the trans-Danubian provinces, had forced back these wild and untamed races towards the north. There, hemmed in by the inclement climate and barren tracts of territory on the one side and the Roman power on the other, these tribes had accumulated till, with the growing weakness of the Roman armies, the strength of the barrier declined. Then came a reaction, in which the barbarians were impelled upon the empire. Under Domitian, Adrian, Marcus Aurelius, Gallus,

under each emperor in turn, the barbarians were seen advancing on the Roman territory and then retiring laden with booty, only to reappear in greater strength and again re-enter their flurva; every day becoming bolder, and showing in every fresh excursion more audacity and greater force. Some emperors bought them off with money; and thus attracted by the allurements of gain and pillage, the Sarmatians, the Goths, the Sarmatians, the Alani, the Carri, the Quadi, the Franks, appeared at first successively and soon almost all at once. This was the prelude to those terrible incursions which were destined to annihilate the empire.

Such was the critical condition of affairs when Diocletian was called to the throne.

EMPERORS.

A.D. 284. **DIOCLETIAN.**

„ 286. **DIOCLETIAN and MAXIMIAN A.D. MAXIMIANUS HERULIUS.**

CONSTANTINE and GALLIENUS, CAESARS.

428. Transferred from a family of freedmen into the class of the emperors, Diocletian, by his energy, his firm aggression, through the rigorous agents under discipline, drove back the barbarians, and restored some stability to the empire which he occupied.

He was one of the most active of the emperors in legislative measures, in reorganising and in constitutions. If we may judge by the edicts which have reached us, we find under his name, in the Code of Justinian, more than one thousand two hundred. What more significant he ought in the history of the law is the final change which he accomplished in procedure, by definitively and generally substituting the *extra-judicialium iudicium* for the *forum system*. It will be noticed that it was in the empire and in the government between the 28 August and the two classes in the government century in his reign.

SECTION LXXXI.

DECAY OF THE FORMULARY SYSTEM OR OF THE *Ordo Judiciorum*—THE EXTRAORDINARY PROCEDURE (*Judicia Extraordinaria*) INTRODUCED GENERALLY—PETTY JUDGES (*Judices Pedanei*).

427. Just as the formula system of procedure was gradually substituted for the *actiones legis*,¹ so in its turn was the *formula* gradually superseded and finally definitely replaced by the *extraordinaria judicia*, or extraordinary procedure.

The principle of the *cognitio extraordinaria* consisted in the fact that the magistrate heard the case and decided it himself; this principle was already recognized in the system of the *actiones legis* as well as in that of the *formulae*. It is the most simple, the least ingenious, the least scientific of the various methods of judicial administration. In the first two systems of the Roman procedure, however, and especially in that of the *formula*, it only existed as an exception. The procedure by *formula*, which involved the separation of the *jus* and *judicium*, the guarantee of the *juges jurés* chosen or accepted by the parties, and the technical regulation of that judge's commission, was the established form of procedure. The magistrate himself only heard and decided the case as an extraordinary measure (*extra-ordinem*): in cases where his *jurisdictio* could end the affair; where he wanted to make use of his *imperium*; where there was no given action according to civil law nor according to the edict; and where extraordinary recourse was had to the power itself of the magistrate (*cognitio extraordinaria*, *persecutio*, and not *actio*). But under the imperial government, when the arbitrary power of the emperor was every day increasing, when his will and his decisions had acquired a superior authority, when the number of suits called or brought before him multiplied, when his officers, his prætorian præfects and his lieutenants participated, through delegation, in the powers of their master, the practice of using the *cognitiones extraordinariæ* became very much more frequent. The emperor did not always himself decide the matters in which

¹ Vide § 252.

he *extra-ordinem* intervened. He often delegated the hearing of them either to the senate, to an officer, or to a citizen; but as it was without the use of formulæ, without the *ordo judiciorum*, and as the person or persons, to whom the hearing of the case was delegated, pronounced judgment in virtue of the power thus delegated, having both the *jus* and the *judicium*, there was always an extraordinary procedure (*cognitio extraordinaria*).

We may observe that this usage had come into vogue even before the provisions of Diocletian on the point. And, on the other hand, all trace had already disappeared of the annual lists of *juges jurés* (jurymen), and of the decuries, annually posted up in the forum and publicly exposed. Everything indicates that these institutions of the republic, preserved for some time under the empire, had by this time fallen into desuetude, and that the choice of the judge was no longer exercised within the same limits and was no longer made according to the same rules.

428. It was in this state of things that Diocletian, through a constitution that we find inserted in the Code of Justinian (A.D. 294), ordered the presidents of the provinces to themselves hear and decide all cases, even those which it was formerly the practice to send before judges. This rule, which seems to apply, in the terms of the constitution, only to the provinces, was made general for the whole empire. Diocletian, it is true, reserved to the presidents the right of giving to the parties subordinate judges, when their public occupations or the multiplicity of the suits prevented them from hearing them themselves;¹ but in such cases the suits were no longer sent before the judges in accordance with the formulary system: the distinction between the *jus* and *judicium*, the regulation of the judge's commission by the terms of the formula, was gone; the whole case was transmitted bodily. The formulary procedure had completely fallen through,

¹ "Placet nobis, Præsides de his causis, in quibus, quod non ipsi possent cognoscere, antehac pedaneos judices dabant, notionis suæ examen adhibere: ita tamen, ut, si vel propter occupationes publicas, vel propter causarum

multitudinem, omnia hujusmodi negotia non potuerint cognoscere, judices dandi habeant potestatem." Cod. 3, 3, *De pedaneis judicibus*, 2 const. Dioclet. et Maximian.

and what was formerly the exception had become the rule, all procedure was *extra-ordinem*. The *jus* and the *judicium*, the office of the magistrate and that of the judge, were confounded, and the name *judex*, *judices majores*, is now applied to the magistrate.

429. From that time, the word *actio* a second time completely changed its meaning; and the *exceptiones* and the interdicts, institutions of the formulary system, lost their true character. The *actio* was no longer either, as under the *legis actiones*, a definite and symbolic form of procedure, nor, under the formulary system, the right conferred by the magistrate to sue before a judge, nor the formula conferring and regulating that right. The *actio* was no longer anything else than the right, resulting from legislation itself, directly to apply to competent judicial authority to sue for what was claimed; or indeed, the act itself of suing. The word *exceptio*, in reality, had no longer any meaning; it was no longer a restriction made by the magistrate on the power of condemnation accorded to the judge; it was a means of defence which the defendant of his own accord presented before the tribunal. The *interdictum* also had no longer any real existence. In those cases where the prætor might have granted it, an action might now be brought before the competent judicial authority. In its outward forms, however, the destruction of the old system does not appear so complete. As the formulary procedure had retained some vestiges or resemblance of the procedure of the *legis actiones*, so the extraordinary procedure preserved, at least nominally, several vestiges of the system which it replaced.¹ The names remained, but they did not harmonize with the institutions, which were radically changed.

430. We find in the constitution of Diocletian the officers

¹ Thus, as a memorial and as a means of effecting a gradual transition from one system to the other, the practice was for some time adopted of demanding, at the time of having the case laid at the registrar's, the formula of action (*impetratio actionis*), al-

though there was no such thing as sending the case before a judge. This usage was abrogated by Theodosius and Valentinian. Cod. Theod. 2, 3, 1, and Cod. Just. 2, 58, 2; Const. Theod. and Valent.

called *judices pedanei*, as an institution already in existence; but from this time they began to take their place in a more ostensible manner, in the secondary ranks of the judicial authorities under the Lower Empire. Whatever may be the etymology of the word *pedanei*, as applied to judges, it most certainly indicates inferiority. They were personages whom the magistrates appointed to the parties as judges before the constitution of Diocletian; and it was to them that Diocletian ordered the case to be sent when multiplicity of business prevented the magistrates from deciding it. But what were these *judices pedanei*? Were they simple citizens, appointed as judges in each case, and for that case only; or, in other words, were they the successors of the ancient *judices selecti*, who took their place when the usage of the annual lists and of the decuries was abandoned? or must we regard them with M. Zimmern as inferior local magistrates, or municipal authorities, to whom the imperial magistrates could refer the hearing of cases of minor importance? or, lastly, were they permanent judges of an inferior rank, instituted within the province of each superior magistracy? All these opinions have been entertained, and if we confine ourselves to the first occasion where the expression *judices pedanei* occurs, we must confess that it is open to conjecture what sense is to be given to that expression.

431. That which appears incontestable is that the institution of the *judices pedanei* itself underwent modifications in the course of the imperial government, and that we must not imagine that the office always remained the same. In the system anterior to the constitution of Diocletian, at the epoch when the formulary procedure was still existing, we may see in the *judices pedanei* only the successors of the ancient *judices selecti*, that is to say, citizens appointed as judges in each case, according to some uncertain standard of aptitude; or, better still, we may regard them only as municipal magistrates, to whom the imperial magistrates referred inferior cases; but, certainly, after the general adoption of the extraordinary procedure, they appear in a permanent and special character, distinct from that of the municipal magistrates of the various

localities. They were therefore judges appointed to hear cases of minor importance, whom the Emperor Julian permitted the presidents of the provinces to constitute within their districts. *Pedaneos judices, hoc est qui negotia humiliora disceptant, constituendi damus præsidibus potestatem.*¹

Thus a constitution of Zeno attaches them in a certain number to each prætoriate. *Zenonis constitutio quæ unicuique prætorio certos definivit judices.*²

Thus Justinian, in so far at least as Constantinople was concerned, organized them anew, formed them into a permanent college, limited their jurisdiction to the sum of three hundred *solidi*, and appointed them himself, as we see by a constitution made by him, in which we can read several similar nominations.³

Everything therefore goes to show that in the time of the Lower Empire they were inferior judges, invested with a permanent and special character, on whom the magistrate could devolve the duty of hearing cases of minor importance, by giving them individually as judges to the parties. The latter, however, had always the right to challenge, and to bring their case before arbitrators chosen by themselves.⁴

SECTION LXXXII.

DIVISION OF THE IMPERIAL GOVERNMENT—TWO AUGUSTI AND TWO CÆSARS.

432. Before Diocletian several princes had sometimes been seen together in the empire, Augusti and Cæsars; Diocletian,

¹ Cod. 8, 3, *De pedaneis judicibus*, 5, Const. Julian. See also Diocl. Const. 4.

² Novellæ, 82, *De judicibus*, cap. i. And also the preface, where it can be seen that Zeno had named in the constitution itself the very persons of the *judices pedanei*.

³ Ibid. cap. i., ii., iii., iv., v. It is in cap. i. that certain advocates personally named are qualified "*pedanei judices tui fori*:" this is addressed to the præ-

torian præfect; and another, "*pedaneum judicem prætorii gloriosissimi magistri sacrorum officiorum*."

⁴ Cod. 3, 1, *De judiciis*, 16 const. Justinian: "Apertissimi juris est, licere litigatoribus judices delegatos, antequam lis inchoetur, recusare: cum etiam ex generalibus formis sublimissimæ tuæ sedis statutum sit, necessitatem imponi, judice recusato, partibus ad eligendos arbitros venire, et sub audientia eorum sua jura proponere."

adopting that usage, transformed it into a system, and made the government to consist of four chiefs: two emperors, equal in power, with the title of Augustus; two emperors subordinated to the former, their lieutenant, so to speak, and their presumptive successors, bearing the title of Cæsars. The idea was to secure a vigorous administration by means of a political machinery consisting of four members, each of whom would, it was supposed, support the other, and thus suppress military ambition and mutiny. This scheme was, to a certain extent, a wise one, and it would have completely answered its purpose if four emperors had been able to unite and make but one single government; but, as an inevitable consequence, they divided, and four different courts were to be seen in the empire. If, on the one hand, there was less want of discipline, and immunity from military ambition, on the other the rivalry of the Augusti and the ambition of the Cæsars found a field, and intestine strife only changed its channels; it did not the less exist. Diocletian had chosen for his colleague Maximian, a shepherd by birth, an officer of his army, and for Cæsars, Constantius Chlorus and Galerius. One year after both the Augusti abdicated their power, and the two Cæsars, taking their place, received the rights and the title of Augustus.

EMPERORS.

A.D. 305. CONSTANTIUS CHLORUS and GALERIUS MAXIMIANUS,
A.A.

SEVERUS and MAXIMINIUS, Cæsars.

433. We have now arrived at the period when the death of Constantius Chlorus brought forward on the political arena his son Constantine, who was destined to play so great a part. Before describing all the changes introduced by that emperor, let us cast a glance at the past, and mark the point at which all the institutions had arrived since the disappearance of the republic.

SUMMARY OF THE PRECEDING EPOCH.

THE EXTERNAL SITUATION OF THE EMPIRE.

434. Rome at first comprised only citizens ; abroad it formed its colonies, its allies, its subjects ; finally, colonists, allies, subjects, all were absorbed ; since the constitution of Caracalla all had become citizens ; it sufficed to secure that title to have been born free within the limits of the empire. Those limits were almost synonymous with those of the then known world.

The territories which formerly composed the frontier now formed the central portion of the empire, and countries which, in the time of the republic, were outside of and beyond the boundaries were now within. Towards the north, however, there was a limit to conquest, a limit beyond which were situated unexplored countries inhabited by numerous races called generically barbarians. These barbarians, when the extension of the boundaries of the empire had made them neighbours, became dangerous and formidable ; ever growing in strength and numbers, warlike and turbulent in character, they paved the way, by often-repeated incursions into Roman territory, for the ultimate downfall of the empire.

JUS PUBLICUM.

435. We have reached a period in the history of Rome when we no longer find the people, the plebeians, and the knights, elements of power in the state. The shadow of power left them by Augustus had disappeared, and the body politic now consisted of the army, the senate, and the emperor.

436. The army maintained its rights by violence, and resisted any attempt to enforce discipline or to deprive it of the tribute which it had imposed upon the emperors,—the distribution of largesses. If the emperor attempted to control the soldiers he was assassinated and another elected in his stead, to be displaced in his turn should he happen, like his predecessor, to displease the troops. Montesquieu says, “that which was called the Roman empire at this period was a species of irregular republic, somewhat resembling the aristocracy of Algeria, where

the militia, in whose hands is lodged the sovereign power, makes and unmakes a magistrate whom they call the Dey." The reforms, however, introduced by Diocletian, the exhaustion of private wealth, and perhaps also a weariness of constant revolutions, at last put an end to these convulsions, and the army, at the period at which we have arrived, had been almost restored to its original limits and duties.

437. The senate was composed of members nominated by the emperor. Despoiled of its ancient splendour, it was now merely an instrument, either in the hands of a revolted soldiery or of a successful leader. It no longer preserved its administrative or its judicial power, except so far as either might be conceded to it. If it assumed independence it was but for an instant, at the end of a reign, in order to place in the ranks of the gods the departed emperor, or to cover his memory with maledictions; in order to erect statues to perpetuate his glory, or to overthrow those which, during his life, he had erected to himself. Nor was it free to exercise its judgment, when the question of the shame or the glory of the deceased prince was anything but a matter of indifference to him by whom he was succeeded.

438. It was necessary that the emperor should be nominated by the senate. Sometimes the tie of parentage, natural or adopted, or more distant blood relationship, in the absence of intrigue, determined the choice,—merit was but rarely taken into consideration. But, in every case, the *senatûs-consultum* was prepared for the victor who marched against Rome at the head of a successful army. It had happened that two emperors had reigned together. The system of Diocletian, however, had produced some important results. The existence of two emperors with the title of Augustus, wielding equal powers, contributed to the actual division of the Empire; and the nomination made by them of the two Cæsars, their actual delegates and their future heirs, prepared a succession in every case, regulated beforehand, provided always that no rivalry interfered with this arrangement.

439. The ancient magistracies had either disappeared, or had become nullities. The consuls, the pro-consuls, and the prætors were still in existence, but had lost the greater part of their power and all their supremacy. From the débris of these Republican magistracies, Imperial magistracies had been formed. The emperor was surrounded by a crowd of dignitaries, elevated to and retained in office by his sole favour; the prætorian præfect united within himself military and civil power: the *præfectus urbanus* was charged with the functions of the ancient ædiles, and had a large portion of the criminal jurisdiction—the *præfectus vigilum*, the *legati*, the Cæsarian *procuratores*—in a word, all the officers created by Augustus—were maintained; for without doubt that emperor had designed everything with a view to absolutism, and nothing remained but to develope the germs which he had planted.

The principal magistrates, such as the prætorian præfects, the urban præfects, the presidents of the provinces, were assisted by numerous persons whom they selected and who received public distinction. These functionaries, styled *assesores* (*ad sessoros*) took cognizance of various matters. They prepared the edicts, the decrees, the epistles; in fact all that of necessity emanated from the magistrates by whose authority they acted.

440. All authority was lodged in the hands of the emperors, who delegated to others the powers which they thought fit to bestow.

LEGISLATIVE POWER.—From the earliest period of the empire the *leges* and the *plebiscita* had ceased, and in the later times of the empire the *senatûs-consulta* also disappeared, and there remained but one single source of law,—the imperial will.¹ The edicts of the magistrates were rather of an administrative than legislative character.

EXECUTIVE AND ELECTORAL POWER.—If the senate took any part in appointments it was but a feeble concurrence in the

¹ The last *senatûs-consulta* of which we know the date with certainty belongs to the reign of Septimius Severus.

Those referred to a later period, even down to Alexander Severus, are doubtful. Vide § 349.

nomination or confirmation of the choice already made by the emperor of certain magistrates,¹ and in matters concerning which he asked their opinion. Some of the emperors surrounded themselves with a species of privy council, styled the *consistorium*, who assisted him in the general administration of the empire.

JUDICIAL POWERS.—The emperor, the senate, the prætors, the consuls, the urban præfects, the prætorian præfects and the local magistrates of each city, and the *judices pedanei*, were the judicial functionaries, to which must be added the college of the *centumviri*, which had been gradually on the decline and was now near its end. The annual list of *judices* had fallen into disuse. The emperor was surrounded by a council, styled the *auditorium*, to whom he submitted the investigation of important suits or questions upon which he desired to adjudicate.

441. CRIMINAL MATTERS.—To the *plebiscita*, enacted under the republic against certain crimes, must be added other *senatûs-consulta*, and the *constitutiones*, which attach penalties to particular acts styled extraordinary crimes (*extraordinaria crimina*). In many cases the forms of criminal procedure under the republic had been discarded, though they were, in fact, the ordinary forms. The emperor himself often pronounced a decree; the *præfectus urbanus*, jointly with the council, determined the greater part of the extraordinary crimes. The senate was invested with the power of examining certain accusations: for example, treason.

442. Eighteen prætors presided at Rome over the different branches of criminal jurisprudence; in the provinces the *præses* or president of each province, or the *vicarius* or other lieutenant delegated by the præfect, and above those the prætorian præfects, acted as judges of appeal representing the emperor,

¹ In the early portion of the empire, when the election of magistrates was still made by the *comitia*, Augustus, according to Suetonius, in order to enable the whole of Italy the better to

participate in this election, invented a system of voting by ballot, the voting tickets being forwarded to each city by the decurions, and subsequently sealed and returned to Rome.

vice sacra, from whose decree a final appeal lay to the emperor himself. At the end of the period with which we are now dealing, the system of formulary procedure, which had been more and more limited by the extension of the extraordinary procedure, was ultimately abandoned, and all procedure became *extraordinem*. The distinction between *jus* and *judicium* ceased, as also between the *judex* and the magistrate, with this exception, that the superior magistrates, in their capacity as *judices majores*, in the event of being overburdened with work, delegated the trial of inferior causes to the *judices pedanei*. Sometimes the emperor, by a rescript, indicated to the judge the decision that he was expected to adopt; at other times, he would determine the matter in controversy by a decree.

Causes were now pleaded before the judges by the lawyers, who had adopted their calling as a profession, and were known by the name of *advocati*.

443. The emperor had under him the whole of the provinces. Some, however, were considered as more especially belonging to the people; others as belonging exclusively to the Cæsar. The former were administered by pro-consuls and senators; the latter by the emperor's lieutenants: after the time of Diocletian, however, the division of the imperial power between the Augusti and the Cæsars brought about a partition of these various provinces.

444. The organization and system of local administration established in the colonies and the *municipia* was extended and generalized throughout the various territories of the empire, and at the same time, under imperial authority, it had acquired a greater degree of uniformity and subordination. So that, notwithstanding the fact that the rights of citizenship were now general, the condition of the people was one of complete subjection.

The inhabitants destined to furnish members of the *curia*, or local senate, formed a special order termed *curiales*, or *curie subjecti*. Wealthy citizens could be eligible to this class, and their children inherited this privilege (*curialis origo*). The

members of the *curia* were called *decuriones*, and sometimes *curiales*. Those called to this office were not at liberty to refuse the summons. If they endeavoured to evade it, either by travelling abroad, or by taking service in the army, or by concealing themselves in the country, the *curiæ* summoned them and compelled them to return. Hence the term *curiæ subjecti*, which indicates a species of subjection. When, however, the number of *curiales* was extensive, care had to be taken when preparing the lists of decurions (*in albo decurionum describendo*), to arrange that the duties should only fall alternately upon those liable to them. In proportion as the curial title brought with it obligations and onerous responsibilities, especially responsibility for the full payment of the impost due from any locality, the imperial policy endeavoured to invest the office with dignity and privileges, so that the curial orders came to be the highest rank in the cities. They were not liable to the same penalties as plebeians; and from their class were elected all the principal magistrates of the city. At the head of these magistrates there were ordinarily to be found *duumviri*, who, during their term of office, which was annual, controlled the affairs of the city and presided over the *curia*.¹

But owing to the oppression of the government under the Lower Empire, the harsh fiscal measures, and the responsibilities with which the *decuriones* were charged for the acts of each other and of the whole locality, the burdens they had to bear became so intolerable that the curial office came to be regarded as a species of servitude. Every available means of escaping this onerous duty was resorted to, and places which enjoyed immunity from the privilege were considered as enfranchised.

THE JUS SACRUM.

445. Paganism was still the system of religion recognized by the public law; the emperor was still the sovereign pontiff; to the divinities worshipped by the Romans the senate added the person of the deified sovereign, who took the name of *divinus*. This class, therefore, became new deities, to whose

¹ Cod. 20, 31, *De decurionibus et filiis eorum*.

honour temples were erected, and for whose worship priests were set apart.

Christianity, however, was gradually making its way, and while the political laws of Rome reckoned the profession of it a crime, the Roman subjects embraced it with ardour. The time was approaching when polytheism was destined to be deprived of legal protection, which was now its main support.

THE JUS PRIVATUM.

446. The epoch of which we are now treating was the most brilliant age of Roman jurisprudence. The jurists of this period comprise a long list of illustrious men who successively adorned the profession, and extracts from whose numerous works in the form of *fragmenta* have been handed down to our own time, and are still held by all enlightened nations in well-merited regard. The revolution which commenced towards the end of the preceding period was fully developed in this, and the primitive, laconic, rude and barbarous legal system of early Rome formed the basis upon which an extensive science of jurisprudence was erected, imbued with the principles of natural equity and adapted to the civilized condition of mankind.

447. It is remarkable that the development of civil law by so many men of superior genius and intellect should have taken place under the empire at a time when liberty was suppressed. Is this to be explained by the fact, that, under a republican form of government, public life is the life of each individual citizen, and the *jus publicum* therefore claims the first place in their attention, whereas under an empire, the subjects having only private life to regard, the *jus publicum* becomes a nullity to them, and jurists therefore naturally devote their whole attention to the development of the *jus privatum*, which acquires value from the fact of its being the only branch of law left for them to deal with? It is also remarkable, that it was under the empire, when the populations had conformed to absolutism, and the *jus publicum* was corrupt, that the *jus civile* became developed, ameliorated and approximated to the laws of natural equity common to all mankind. Was it because a republic,

with a firm administration, and isolated from other countries, frames its own laws for its own objects in a terse form, and bearing the impress of republican energy, often in opposition to the principles of natural equity, because each person, in such a community, is regarded not as an individual but as a citizen, whereas in a vast empire like that of Rome, comprising various nations and possessing no longer any such institution as real citizenship, men are regarded simply as individuals, and, as such, have to be governed by those general laws which are applicable to all mankind, and which are necessarily at the same time more numerous and more closely allied to the principles of natural justice?

Be the case as it may, this change took place. The new system was not, however, framed upon a new basis, but upon the old. The laws were not remade, but remodelled. The fundamental principles of the Twelve Tables and of the civil law were universally retained, and the amalgamation of the contradictory elements of the past system with the reality of the present constitutes the characteristic feature of the Roman law.

448. PERSONS.—The enfranchised were divided into three classes,—enfranchised citizens, enfranchised *Latini juniani* and enfranchised *dedititii*; the second class being assimilated to the ancient *Latini coloni*, whose rights they enjoyed, the third to those nations who surrendered to Rome at discretion. The power of the master over the slave had decreased; he had now no longer the right of life and death, and the slave who had been illtreated might complain to the magistrate. The paternal power, *patria potestas*, had also decreased, and the father could no longer, as a general rule, either sell or pledge his child.¹ The son had begun to have responsibility, to be considered capable of possessing rights; he was the sole proprietor of his *castrense peculium*, that is to say, of property acquired by military service. Marital power was almost extinct, *usus* was no longer a medium of acquiring it; *coemptio* had become rare, and *confarreatio* was confined to the pontiffs. Natural paren-

¹ Cod. 4, 43, *De patr. qui fil.*, 1 const. Diocl.

tage was that chiefly considered by the prætor; the perpetual tutelage of women under their agnates had ceased; *gentilitas* no longer existed. From the time of Augustus a great difference had been recognized between the *cælibes* and the married; between those who had children and those who had none: a difference which had introduced a notable inequality in their respective rights, especially as to their ability to receive testamentary bequests.

449. THINGS AND PROPERTY.—The distinction between *res Mancipii* and *res nec Mancipii* still existed, as also did that between immovable property in Italy and elsewhere: *Mancipatio* therefore was still in vogue. The right of property was divested of its ancient Quiritarian appellations, and had commenced to take the more general and philosophical term of *proprietas*, signifying that the thing alluded to was appropriated to a given person.¹ Thus philology, in the three successive names given to this right, reveals the history of the vicissitudes and transformation of Roman society. *Mancipium*, in primitive times (*manu capere*), was the term used when war and the lance were the principal methods of acquiring property. *Dominium*, at a later date, expressed the notion that the *domus*, or house, was the proprietor, all the individual members being absorbed in the person of its chief or head. And, finally, *proprietas* recognized the individual character; the sons being persons capable of having proprietary rights. It was no longer a question of the *domus*, for each individual might be an owner.

450. TESTAMENTS.—The father of the family had no longer the exclusive privilege of making a will, for the sons might in this way dispose of their *castrense peculium*. In order, however, to be able to accept without restriction testamentary gratuities, the beneficiary must not be of the class *cælebs*, but must have the *jus liberorum*, that is to say, the rights enjoyed by those who had children. The civil forms of the testament were still retained in civil law in the emancipation of the inheritance, but the prætor had introduced another form, in which *manci-*

¹ Dig. 41, 1, *De adq. rer. domin.*, 13, f. Nerat.

patio was suppressed. Soldiers on service were relieved of all formality. Codicils were valid, and in such as required no formality legacies might be given and *fideicommissarii* appointed, provisions which the heir was bound to observe.

451. SUCCESSIONS.—The tendency of legislation was continually leaning towards the rights of succession to natural relations; by virtue of two *senatûs-consulta*, children succeeded to their mother, and, in certain cases, mothers to their children.¹ The prætor, in order to correct and to supplement the civil law, continued to give the *possessio bonorum*.

452. CONTRACTS AND ACTIONS.—The theory of the four contracts of the *jus gentium* being obligatory, by consent alone, had been gradually developed and was by this time fully accepted; the number of pacts, or simple agreements recognized by the imperial and by prætorian law as obligatory, had been augmented. Pacts, however, although obligatory, were not dignified with the title of contracts, which word was still confined to those of the ancient civil law. The old *legis actiones* had still further fallen into disuse, and the formulary system, by which they were replaced, at the end of the period now under consideration itself gave place to the *extraordinaria judicia*.

MANNERS AND CUSTOMS.

453. There is a striking contrast between the picture presented by the manners and customs of the Romans during the republic, when every citizen breathed the spirit of freedom within the republic and domineering supremacy without, and that presented by the same picture under the empire. But we have been brought up to this period in the history of Rome by a gradual approach, and the attention having been confined to details, has been withdrawn from the striking differences which characterize distant epochs; the extent of the changes which

¹ The S. C. *Tertullianum* (Antoninus Pius) and the S. C. *Orphitianum* (Marcus Aurelius), the former for the

right of succession of the mother, the latter the children.

had taken place can only be fully realized by noting sudden transitions from one period to the other.

Taught under Augustus to obey a single individual, despoiled of all public rights, of their ancient magistracies, crushed beneath the sceptre of emperors or the sword of the military classes, and assimilated to all the other nations which helped to constitute the empire, the Romans had almost forgotten the fact that they were once free men. We now see them seeking for the approbation of a master, supplicating favours, looking anxiously for the rescript which brings them promotion. Even jurists, with their high sense of justice and the liberality of their opinions when dealing with the *jus privatum*, forget their wisdom and their independence when treating of the *jus publicum*, and look upon all power as lodged in the hands of a single individual. Meantime religious dissension spreads throughout the state, spleen, hatred and persecution following in its wake.

II.—FROM CONSTANTINE TO JUSTINIAN.

454. The system introduced by Diocletian soon bore fruit; military *émeutes* disappeared, and the constitutional struggle between the Augusti and the Cæsars was rekindled. Diocletian, from the depths of his retreat, could observe the incendiary at work, and trace his ravages; he saw his old colleague Maximin reappear upon the scene with his son Maxentius, both clad in the imperial purple. The two Augusti, Severus and Galerius, hastened to march against the usurpers, and in the midst of this turmoil the two Cæsars, Constantine and Maximin, were decorated with the title of Augustus, and the state was torn in pieces by the efforts of six emperors each struggling against the other, A.D. 307.

EMPERORS.

In the East, GALERIUS, LICINIUS, MAXIMIN.

In the West, MAXENTIUS, MAXIMIAN, CONSTANTINE.

Death reduced the number to four, A.D. 310, and there then remained—

In the East, MAXIMIN and LICINIUS.

In the West, MAXENTIUS and CONSTANTINE.

Then ensued war between Maxentius and Constantine. The latter rapidly traversed Italy, and defeated Maxentius, who perished in the Tiber. Constantine entered Rome in triumph, and found himself sole master of the West. On the other hand, war was raging between Licinius and Maximin; the latter succumbed, and Licinius ruled in the East, A.D. 313.

In the East, LICINIUS. In the West, CONSTANTINE.

The struggle then continued between these two, ending after a few years in the defeat of Licinius, and Constantine, without a rival, remained sole master of the entire empire, A.D. 314. Such is the fate of ambition associated with despotism. Rivalry ends in the victory of one and the destruction of the rest, and the victor erects his throne upon the ruins of the whole.

455. In the midst of these wars the jurists still found subjects to which their attention might profitably be directed. Constantine, after his victory over Maxentius, without himself embracing the Christian religion, placed it under imperial protection;¹ and at a later date, A.D. 320, he as a consequence of this protection abolished the disability under which the *cælibes* had lain, a burden which had chiefly fallen upon the Christians, many of whom considered it meritorious to abstain from marriage. Thus passed away for ever the distinction between the *cælibes* and the married, a political distinction which had occupied so large a share of the attention of the jurist, the historian and the poet.

It would be easy to refer to various constitutions of Constantine, but we confine ourselves to a few.

¹ Licinius also was favourably disposed towards Christianity. In A.D. 314, after the partition of the empire between Licinius and Constantine, the

edictum Mediolanense was passed, which accorded protection to Christianity.



SECTION LXXXIII.

CONSTITUTIONS INVALIDATING THE NOTES OF PAUL, ULPIAN AND MARCIAN UPON PAPINIAN, AND APPROVING THE OTHER WRITINGS OF PAUL AND PARTICULARLY HIS SENTENTÆ.

456. From the publication of the rescript of Adrian, which had given the force of law to the opinions of the authorized jurists when unanimous, up to the time when Licinius and Constantine divided between them the Roman empire, about two centuries had elapsed. Between the time of Adrian and Alexander Severus, however, we find a series of celebrated jurists. Confining ourselves to those whose names are mentioned in the Digest of Justinian, we have seventeen who left behind them numerous and voluminous writings, and who, it must be supposed, enjoyed for the most part the imperial authorization. Amongst them are Pomponius, Scævola, Gaius, Papinian, Ulpian, Paul, Marcian and Modestinus, with the last of whom the list of the great jurists seems to close. Thenceforth the magistrate, the judge, the litigant, the advocate and the student had to depend upon the past era of jurisprudence, which was far superior to that of their own time. Legal interpretation reduced to a conflict of quotations, under a spirit of servility to the voluminous dicta of old masters, must have been a difficult and uninteresting task. We can in a measure realize this from what takes place amongst ourselves when our own practitioners confine their research and argument to a parade of quotations. The rule established by Adrian concerning the unanimity of opinion necessary to constitute law, though simple in principle, became more and more ineffectual in practice, on account of the difficulty of finding that unanimity in such a multitude of authorities, and proving it when found. When it was not proved, the judge was at liberty to make his election between the conflicting opinions, and a door was thus opened to controversy both upon the law and the value to be attached to the opinion of one jurist over another. Among the jurists themselves, however, the prevailing authority was Papinian. But

there were other jurists who, independently of their learned works, had become popular on account of the excellent elementary treatises which they had published. Among these were Gaius, Ulpian, Paul and Marcian, the last three of whom had also annotated the works of Papinian; but their notes, whether critical or otherwise, had only tended to perpetuate uncertainty. We already knew, from passages in the Codes of Theodosius and Justinian, that these notes, on account of the great honour rendered to Papinian (*propter honorem splendidissimi Papiniani*), had been disparaged in the imperial constitutions;¹ when in our own day, amongst the new fragments of the Theodosian Code discovered by M. Clossius, was found the constitution concerning the notes of Ulpian and of Paul: it is a constitution of Constantine, bearing date A.D. 321. The emperor assigned as the reason of his disparagement that the notes had more frequently corrupted than amended the writings of Papinian, but that he was especially desirous to put an end to the perpetual contests between the jurists (*perpetuas prudentium contentiones eruere cupientes*).² In fact, having regard to the practice in vogue in his time of accepting the authority of Papinian, and disentangling it from the criticisms of Ulpian and Paul, he rendered considerable service, if in no other way, in this, that he diminished the source of perplexity to the judges. As to that which concerns the disparagement of the notes of Marcian, the date of the text of the constitution still remains unknown to us.

457. The provision of Constantine, declaring the invalidity of the notes upon Papinian by Ulpian and Paul, and especially

¹ Cod. Theod. 9, 43, *De sentent. passis*, const. univ. Constantin.: "Remotis Ulpiani atque Pauli notis, Papiniani placet valere sententiam" (A.D. 321). Ibid. 1, 4, *De responsis prudentum*, 3, const. Theodos. et Valentin.: "Notas etiam Pauli atque Ulpiani in Papiniani corpus factas, sicut dudum statutum est, precipimus infirmari" (A.D. 426). Cod. Justinian. 1, 17, *De veteri jure enucleando*, 1, § 6: "Quæ antea in notis Æmilii Papiniani ex Ulpiano, et Paulo, nec non Marciano adscripta sunt, quæ antea nullam vim

obtinebant propter honorem splendidissimi Papiniani, etc. . . ." (A.D. 530).

² Cod. Theod. 1, 4, *De responsis prudentum*, 1, Constantinus A. ad Max. Præf. Præt.: "Perpetuas prudentium contentiones eruere cupientes, ULPIANI ac PAULI in PAPINIANUM notas, qui dum ingenii laudem sectantur, non tam corrigere eum quam depravare maluerunt, aboleri precipimus." DAT. III. KAL. OCT. CONSTANTINO II et CRISPO II COSS. (A. 321).

the terms in which this invalidity is declared, was of such a nature as to cast discredit upon the other works of these two jurists. It is easy to conjecture that such was the case, or at least was apprehended, in connection with Paul, who seems to have been followed especially in the west, whereas Ulpian had more credit in the east, and that the emperor was entreated to explain himself upon this matter. In fact, six years after the publication of the constitution invalidating these notes, another constitution of the same prince, with the existence of which we have become acquainted from a passage of the *Consultatio veteris jurisconsulti*,¹ declared the independent works of Paul, and particularly his *sententiæ*, worthy of being confirmed and quoted as an authority before the judges.

The provisions of this constitution, which belonged to A.D. 327, are also contained in the new texts of the Theodosian Code, brought to light by M. Clossius, to which we must refer to appreciate the laudatory tone in which the emperor alludes to the works, and especially to the *sententiæ*, of Paul.²

458. These are the only texts relating to the authority of the jurists with which we are acquainted, and from them we gather that the general rule as to it, is that established by Adrian: unanimity, in order that the opinions of the jurists may be law; in default of unanimity, the judge is free to adopt which opinion he thinks best; as a general rule, however, preference is given to the authority of Papinian; the notes upon Papinian, by Ulpian, Paul and Marcian, are declared by the emperor invalid; but imperial authority recognizes the other writings of Paul, of course, as precedents. Thus, as to the special mention of the works of the jurists, we only see two imperial constitutions relating to them; the one to invalidate

¹ *Consultatio veter. juriscons.*, § 7: "Secundum sententiam Pauli iudici cujus sententias sacratissimorum principum scita semper valituras divalis constitutio declarat."

² Cod. Theod. 1, 4, *De responsis prudentum*, Constantinus A. ad Maxim. Præf. Præt.: "Universa, quæ scriptura PAULI continentur, recepta

auctoritate firmanda sunt et omni veneratione celebranda. Ideoque Sententiarum libros, plenissima luce et perfectissima elocutione et justissima juris ratione succinctos, in judiciis prolatos valere minime dubitatur." DAT. V KAL. OCT. TREVIRIS, CONSTANTINO CÆS. V et MAXIMO CÆS. (A. 327).

the notes upon Papinian, the other to confirm the remaining writings of Paul, the credit of which had been damaged by the preceding constitution.

Such appears to have been the state of things for another century, that is, till the time of Theodosius the 2nd and Valentinian the 3rd, who, in A.D. 426, introduced other changes.



SECTION LXXXIV.

THE GREGORIAN AND THE HERMOGENIAN CODES (*Gregorianus Codex, Hermogenianus Codex*).

459. Already, in the time of the classical jurists, some among them had published works upon the imperial constitutions promulgated at the period to which they belonged. We know of one by Papirius Justus, who lived under Marcus Aurelius. In addition to his *Institutes*,¹ we find quoted in the Digest of Justinian fourteen fragments, and two books upon the constitutiones (*De constitutionibus*, lib. 1 and 2), which only contain an extremely dry analysis, a mere summary of a series of rescripts of the Emperors Antoninus (Marcus Aurelius) and Verus, of whom he was a contemporary, without any indication of the dates. The principal of these fragments are referred to in the note.² We also know, from passages in the Digest of Justinian, that Paul, who belonged to the time of Septimius Severus and of Caracalla, published a collection of decrees, three books of which are quoted (*Decretorum*, lib. 1, 2 and 3).³ This is connected with another publication of six books upon the same subject, but under another title: *Imperialium sententiarum in cognitionibus prolatarum, sive decretorum, libri sex*.⁴ In these

¹ Dig. 2, 14, *De pactis*, 60, Papirius Justus, lib. viii. *Institutionum*.

² Dig. 49, 1, *De appellat.*, 21; 50, 1, *Ad municip.*, 38; 50, 8, *De administr. rerum ad circit. pertin.*, 9; all fragments of Papirius Justus, lib. i. or lib. ii., *De constitutionibus*.

³ Dig. 26, 5, *De tutor. et curat. datis*, 28; 44, 7, *De oblig. et action.*, 33; 48, 19, *De pœnis*, 40; 49, 15, *De captiv. et postlim.*, 47, 48 and 50; 50,

2, *De decurion.*, 9; all fragments of Paul, lib. i. or ii. or iii., *Decretorum*.

⁴ Dig. 28, 5, *De hered. instit.*, 32; 35, 1, *De condit. et demonstrat.*, 113; 36, 1, *Ad S. P. Trebell.*, 81; 37, 14, *De jure patron.*, 24; 40, 1, *De manumiss.*, 10; 50, 16, *De verbor. signif.*, 240; all fragments of Paul, *Imperialium sententiarum in cognitionibus prolatarum libri sex*.

collections the fact and the emperor's decision are briefly stated: *Severus Augustus dixit; imperator noster pronunciavit*; or simply *Decrevit, putavit imperator; placuit, placet, rescriptum est*. We must also rank in the same category the commentary of Paul, upon certain imperial constitutions issued under the form of letters or propositions addressed to the senate: *Ad Orationem Div. Antonini et Commodi; Ad Orationem Div. Severi*.¹

460. There only remain to be mentioned the two collections belonging to the period at which we have arrived, and which are quoted as the Gregorian Code and the Hermogenian Code. These are two collections of imperial rescripts, arranged in a certain methodical order, each rescript having the name of the emperor from whom it emanated and the name of the person to whom it was addressed, the text of the rescript, the calends and the consuls,—from which we may determine its date,—and brief sketches embracing the reigns of several successive emperors during a period of about a century, infinitely more valuable than the analytical summaries of Papirius Justus, which are extremely curt. It is to these two collections that the term code was first applied, a word which since, independently of its other more general acceptations, bears in the lower empire the technical signification of a collection of imperial constitutions.

461. These two codes had no legislative authority; they were private collections made by two jurists whose names they respectively bore—Gregorianus and Hermogenianus. Neither of these codes has descended to us in a complete form. Our knowledge of them is derived from the collections that we possess in various works of extracts that have been made from them, to which attention will be directed hereafter.² It is cer-

¹ Dig. 23, 1, *De ritu nuptiar.*, 60, Paul, lib. sing. *Ad Orationem Div. Antonini et Commodi*; 27, 9, *De rebus eor. qui sub tutel.*, 2 and 13, Paul, lib. sing., *Ad Orationem Div. Severi*.

² Many in the *Lex Romana Visigothorum*, called also *Breviarium Aluri-*

oianum; others in the *Mosaicarum et Romanarum legum collatio*, called in the middle ages *Lex Dei*; in the *Consultatio veteris cujusdam jurisconsulti*; some in the *Lex Romana Burgundiorum*, or *Responsa Papiani*; and in the *Vaticana fragmenta*.

tain that they are anterior to Theodosius, because in A.D. 429 that prince ordered that they should be taken as models (*ad similitudinem Gregoriani atque Hermogeniani codicis*) for the third code to which he gave his name. It is also particularly to be remarked, that this third code is, to a certain extent, but the continuation of the two former, only including those constitutions which date from Constantine, that is, from A.D. 312, the point at which the Gregorian and Hermogenian codes stop.¹ The code of Justinian, on the contrary, contains a great number of imperial constitutions prior to Constantine, and there can be but little doubt that the sources from which they were drawn were the Gregorian and Hermogenian codes.

462. The Gregorian code is the one of which we possess most fragments; and of this we have only seventy constitutions, whereas it is certain that it must have contained a much greater number.²

It was divided into books, the number of which, according to the *indices* we have, was fourteen, but we do not know how many more there were; the books were subdivided into titles, each having its heading. As it was the model on which the codes of Theodosius and of Justinian were compiled, we can tell that the constitutions were arranged under each article by order of date. The space of time embraced by the constitutions which are known to us extends from A.D. 196 to A.D. 296—exactly a century. The first is one of the emperor Septimius Severus, and the last of the emperors Diocletian and Maximian. It is therefore after this last date, in the latter years of the reign of Diocletian and before that of Constantine, from A.D. 296 to A.D. 385, that this code, according to all appearances, was compiled. Gregorianus, the author, is not known to us in any other way, his name not being found again anywhere in the history of the law.

¹ Cod. Theod. 1, 1, *De constitutionibus principum et edictis*, 5, const. Theod. et Valentin.: "Ad similitudinem Gregoriani et Hermogeniani codicis, cunctas colligi constitutiones decernimus, quas Constantinus inclutus, et post eum divi Principes Nosque tulimus."

² The title *De nuptiis* alone contained at least thirty-two, from what we read in the following passage of the *Collatio legum Mosaicarum et Romanarum*, tit. 6, c. 5: "Hanc quoque constitutionem Gregorianus, titulo *De nuptiis* inseruit, quæ est trigesima et secunda."

463. The information we have about the code of Hermogenianus is still more incomplete. We scarcely possess thirty-two constitutions, no index of books, and indeed only a few articles with their divisions. These constitutions are all of the reign of Diocletian and Maximian, Diocletian and Constantius, from A.D. 287 to A.D. 304, that is to say, in all seventeen years. We have, however, in the *Consultatio veteris jurisconsulti*, at chapter ix., seven constitutions of Valens and Valentinian (A.D. 364 and 365) placed under the heading, *Ex corpore Hermogeniani*.

A theory has been started, and it is one we are inclined to support, that the expression *Ex corpore Hermogeniani* is a mistake. This theory is grounded on the notion that neither the code of Hermogenianus nor that of Gregorianus came down to the epoch of Constantine; at any rate, that at this epoch these two compilations terminated and that of Theodosius commenced.

Cujas proposed to substitute for it *Ex corpore Theodosiano*, and he suggested placing the seven constitutions in question at lib. ii., art. 9, *De pactis*, of the code of Theodosius, but recent discoveries have shown that they are not to be found in it. Various hypotheses have been hazarded to explain this presence in the code of Hermogenianus of the constitutions of Valens and Valentinian, such, for instance, as that they might have been inserted in it in some editions, or through subsequent additions. The whole subject is one of conjecture.

464. The almost simultaneous existence of two codes of the same kind also appears to require some explanation. The question occurs whether one code was intended to supplement the other; which, however, could hardly be the case, as a certain number of constitutions are indicated as being found equally in both. Again, whether the Gregorian code was intended more particularly for the West, and the other for the East, or whether, lastly, we need look for any other explanation than the fact of two jurists entering into an agreement to bring out a work of the kind, the necessity of which would be suggested by the surrounding circumstances of their time, and by the phase

which the imperial law had assumed, each treating the subject of his work from his own point of view.

465. The name of Hermogenianus is not, like that of Gregorianus, exclusively confined to the code. We find in the Digest of Justinian a considerable number of fragments, more than ninety, taken from an abridged treatise on law, in six books (*juris epitomæ*), by a jurist also named *Hermogenianus*. It would be satisfactory if we could believe that this was the compiler of the imperial constitutions, or the editor of the code of that name. For the accuracy, the neatness and the comprehensiveness of the abridgment show that the author must have been one of the last representatives of juridical science, and very superior to the average writers of his time. He himself declares that he followed in his epitome the arrangement of the *edictum perpetuum*.¹

466. Among the treatises written upon the reconstruction of the Gregorian and Hermogenian codes, and the editions which have been published of those codes, we shall confine ourselves to that of Cujas in the sixteenth century, and that of Haenel, in Germany, in 1837.²

EMPEROR.

A.D. 325. CONSTANTINE, A.

The reign of Constantine was remarkable for the triumph of Christianity, the foundation of a new capital, and changes in the administration of the empire.³

¹ Dig. 1, 5, *De statu hominum*, 2, f. Hermogen. : "Ordinem edicti perpetui secuti."

² *Tituli ex corpore Codicis Gregoriani et Hermogeniani, et multo plures quam prioribus editionibus haberentur*; placed by Cujas at the end of his edition of the code of Theodosius, Lyons, 1566, in fol. *Codicis Gregoriani et Codicis Hermogeniani fragmenta*, placed by Gustavus Haenel at the head of his edition of the Code Theodosius, Berlin, 1837, in quarto.

³ For the study of the public law of

this epoch I can with much satisfaction refer the reader to the work of our colleague of Dijon, entitled "*Public and Administrative Roman Law from the fourth to the fifth century (from Constantine to Justinian)*," by M. De Serrigny, Professor of Administrative Law of the Faculty of Dijon (Paris, 1862, 2 vols. 8vo).

The laws on the subject of religion form the last book of the Cod. Theod. and the beginning of the first book of the Cod. Just. Several constitutions of Constantine are to be found in it from

SECTION LXXXV.

CHRISTIANITY THE RELIGION OF THE EMPIRE.

467. We have seen how rapidly Christianity spread, first from one individual to another, then from province to province. The efforts of the emperors to restrain it only increased its vigour. Constantine, either from the influence of broader views, or from policy or conviction, changed the system. As Cæsar, in Gaul, he had defended the Christians against their persecutors. After his conquest of Maxentius and the West, he still further favoured them: and when he became master of the empire he proclaimed their religion to be the religion of the state. Thus the extent of his protection and support of Christianity increased in proportion as he rose in power. He professed himself to belong to the new religion, though he had not been baptized, and most of his nobles and of his subjects followed his example. Then it was that the whole system of the *jus sacrum* of ancient Rome fell to pieces, together with all of the *jus publicum* that was connected with it. The pontiffs, the flamens, the vestals disappeared from the court, and were replaced by priests and bishops. The old division of the people into Christians and pagans was not indeed effaced; but their conditions were changed, the Christians finding themselves under the protection of the laws and of the government, the pagans subjected to various penalties and disabilities. To the ranks of pagans were now added heretics; for already, in the cradle of the Christian church, there arose obstinate discussions on religious dogmas—a perpetual source of trouble and disorder.¹

A.D. 313 to 336: Cod. Theod. 16, 2, *De episcopis, ecclesiis, &c.*, seven constitutions, from 313 to 330; 5, *De hæreticis*, two constitutions, 326; 8, *De Judæis*, five constitutions, from 315 to 335; 9, *Ne Christianum mancipium Judæus habeat*, one constitution, of 336; 10, *De paganis*, one constitution, of 321; and the famous constitutions of Gratian, Valentinian and Theodosius (1, *De fide cathol.*, 2): “Cunctos populos, quos clementiæ nostræ regit temperamentum, in tali volumus religione versari, quam divinum Petrum aposto-

lum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat” (A.D. 380).

¹ It was to put an end to these disputes that the first general assembly, known under the name of council, took place at Nicæa, A.D. 325, where there were assembled 318 bishops and a great number of priests; the emperor himself attended it. The opinions of Arius were condemned as heretical, but they were not put down, and were destined for a long time to divide the empire.

468. From this moment the influence of Christianity on the law, which had been heretofore but an indirect influence operating through the propagation of ideas unrecognized even by those who were subjected to it, became more marked. It acted with authority. Although it introduced no revolution in public institutions, and certainly not in private legislation, although it accepted these things as it found them, yet in many respects, and especially in everything connected with religion, it sensibly modified the former, and in the domain of private law it introduced a totally new spirit and tendencies.

SECTION LXXXVI.

THE FOUNDATION OF A NEW CAPITAL.

469. Rome, which had been losing day by day the imposing character and the grandeur which its people and its institutions gave it, had ceased to be the first city in the empire. The emperors had abandoned it, and, fixing their residence far from its walls, they had successively increased the distance which separated them from that fallen capital. Diocletian had carried his court to Milan, whilst his colleague had a brilliant one at Nicomedia. Constantine showed still greater dislike for Rome, and only made a few fleeting visits to it. At last, when left without a rival, he desired to make his capital the centre of his vast dominions. Italy was but one of the extremities of it; the Eastern portion presented more attractions, and offered, as a capital, Byzantium, situated on the Bosphorus, connected with two seas, and opening out communications with all the provinces. He therefore selected that city, had it rapidly enlarged, or, to speak more properly, built; gave it the name of Constantinople, and located in it the seat of empire. Abandoning disinherited Italy, the nobles, the dignitaries, the courtiers followed the emperor to the new metropolis. There the luxury, the effeminacy, the servility of the East soon appeared, and crowds of royal attendants, amongst whom were eunuchs, filled the

palace. Greek became the general language; the great ideas, the *souvenirs* of a past age of glory, did not follow the court to the Bosphorus; they remained on the shores of the Tiber in the midst of Italy, where, in striking contrast with those relics of past splendour, Rome possessed little beyond a powerless senate, exiled in almost deserted walls. And yet, such is the force of habit, and so great the influence of a long period of power, that the names of Rome and of Italy were preserved in the laws as a peculiar favour; and the inhabitants retained the special rights which they had formerly enjoyed. Real estates, or immovable property situated in those places, were still for a long time kept distinct from the immovable property of the other provinces and classed with *res mancipii*. So that the emperors in fact, to raise up Constantinople, merely granted it the privileges of Rome.

470. It was impossible, however, that the change of religion and of capital should not introduce modifications in the administration of the state and in the various magistracies. A few new offices were created in addition to those which already existed, and of the latter some were invested with superior dignity, while others were debased. We have a few words to say about the *episcopi*, the *patricii*, the *comites consistoriani*, the *questores sacri palatii*, and the magistrates of the provinces.



SECTION LXXXVII.

THE BISHOPS (*Episcopi*).

471. Among the first dignitaries of the empire were the bishops; their principal functions consisted in the duties which the humanity and the charity of their religion imposed upon them, and which is their finest attribute—the care of the poor, of captives, of exposed children, of children forcibly prostituted by their fathers. Occupying the first rank in the cities in which they resided, and enjoying the respect and veneration with which all religions invest their ministers, they were members of

the councils which nominated the guardians and the curators; they enjoyed, like the consuls, the proconsuls, and the prætors, the power of enfranchising the slaves in the churches; they even acted for those magistrates during their absence. And, in fact, pressing near the throne, they often directed the emperor in the affairs of the state.

472. The genius of Christianity, which breathes the spirit of charity and of conciliation, was opposed to law suits and to the animosity which they generate. St. Paul advised the Christians to keep away from the civil tribunals, and to have their differences settled like brethren, through the ministry of the principal members of the church. The judicial organization of the Romans, which allowed every facility to the suitor for challenging the judge, and for resorting to arbitration, accommodated itself easily to this usage, which had spread widely among Christians. Constantine made it a legislative institution, and invested the bishops with a certain jurisdiction, to which certain classes and matters relating to religion and the churches were amenable, while, in other cases, it was only exerciseable at the option of the parties, and thus constituted a system of voluntary arbitration to which they might have recourse when it suited them to do so. Thus the *episcopalis audientia* or the episcopal jurisdiction was sustained by the confidence of the faithful.¹



SECTION LXXXVIII.

THE PATRICII.

473. Constantine gave this title to a few eminent personages who had filled high magistracies in the empire, and who were to be his intimate counsellors in times of need. Some imperial constitutions represent the *patricii* as chosen in some way by the emperor to be to him as fathers (*loco patris honorantur—quem sibi patrem imperator elegit*). This dignity, which was honorary and lasted for life, but without any jurisdiction or im-

¹ Cod. 1, 4, *De episcopali audientia*.

perium, was perpetuated under the other emperors; it was a kind of honorary distinction, conferring high rank and precedence in the hierarchy of the Lower Empire (*qui cæteris omnibus antepositur*). The emperor Zeno designated it an honorary consulship.¹

SECTION LXXXIX.

COMITES CONSISTORIANI.

474. Previous emperors had instituted a kind of council of state called a *consistorium*, which took cognizance generally of state affairs. Constantine strengthened the council and added to its members, who were called *comites consistoriani*. He also established at Constantinople a senate similar to that at Rome. This senate appears to have been the council of the empire, while the *consistorium* was the council of the emperor.²

SECTION XC.

QUÆSTOR SACRI PALATII.

475. This functionary was a kind of high chancellor, charged with the duty of preserving the law, drawing out projected enactments, keeping a list of the favours and distinctions granted by the emperor, preparing rescripts and forwarding them. It is probable that the origin of this office was the *quæstor candidatus* of the emperor, an office created by Augustus, and which developed itself under his successor, and changed its name under Constantine.

¹ Cod. 12, 3, *De consulibus*. . . et *patriciis*.

² Cod. 12, 10, *De comitibus consistorianis*. The title of *comes*, which signifies, properly speaking, companion, and from which we have derived that of count, was not applied merely to the members of the consistory; there were several other officers who bore it: *comes*

sacrarum largitionum, *comes rerum privatarum*, *comes sacri palatii*, *comites militares*. It was also at this epoch that the name of *dux*, duke, began to form the title of certain functionaries. See Cod. 1, 46, *De officio militarium judicum*, 3, const. Theod. et Val.

SECTION XCI.

MAGISTRATES OF THE PROVINCES.

476. The empire was divided by Constantine into four great prætorian præfectories,—the East, Illyria, Italy and Gaul. Each præfectory was divided into several dioceses, and each diocese into several provinces.¹

At the head of each præfectory was placed a prætorian præfect; to the dioceses the emperor sent, to represent the præfects, magistrates named vicars (*vicarii*); lastly, each province was confided to a president, who bore the title either of proconsul or of rector (*rector provinciæ*).

SECTION XCII.

OTHER FUNCTIONARIES OF THE EMPIRE.—A NEW
HIERARCHICAL NOBILITY.

477. To complete the list of the functionaries we must add to it the consuls, the prætors, the *præfectus vigilum*, the *præfectus annonarum*, the *præfectus urbi*, which had not been as yet established in Constantinople; the *magister equitum*, and the *magister militum*, or commander of the infantry, who had inherited all the military power of the prætorian præfects: for Constantine had suppressed the prætorian soldiers, and had left to the præfects nothing but a civil jurisdiction. There were besides a crowd of noble servitors, with whom the emperor surrounded himself, known under the various names of *cubicularii*, *castrensiani*, *ministeriani*, *silentiarii*, &c., all comprised under the general expression *palatini*, or officers of the palace who were attached to the emperor and not to the state, and whom we shall pass over in silence.

478. From all those offices there had issued a sort of new

¹ *Præfecture of the East*, comprising Asia, Egypt, Libya and Thracia: five dioceses, forty-eight provinces.

Præfecture of Illyria, comprising Mæsia, Macedonia, Greece and Crete: two dioceses, eleven provinces.

Præfecture of Italy, comprising Italy, a part of Illyria and Africa: three dioceses, twenty-nine provinces.

Præfecture of Gaul, comprising Gaul, Spain and Brittany: three dioceses, twenty-nine provinces.

nobility, arranged hierarchically, each class of which enjoyed its insignia, its honours, its privileges, its exemptions. The princes of the imperial family were *nobilissimi*. Certain offices which ranked in the highest class, and among which were to be found those of the prætorian præfects and præfects of the city, the quæstors of the sacred palace, and several classes of *comites*, gave to those who were invested with them the title and the rank of *illustres*. Others, in the second degree, especially certain proconsuls or vicars, certain classes of *comites* or dukes (*duces*), &c., enjoyed the title and rank of *spectabiles*. Others, such as the consularies, the *correctores*, the presidents, &c., had the title and rank of *clarissimi*. In the fourth rank were the *perfectissimi*, among whom were reckoned the *duumvirs* and the *decurions* of the cities. Lastly, in the lowest rank, came the *egregii*. Thus the different classes and degrees among the nobility were clearly defined. There is a table extant, a sort of almanac of the Roman empire, dating about the middle of the fifth century, which gives a list of all these functionaries of the East and West and their rank.¹



SECTION XCIII.

INNOVATIONS OF CONSTANTINE IN THE *JUS PRIVATUM*—
ABROGATION OF THE PENALTIES AGAINST CÆLIBES AND
ORBI—NEW AMENDMENTS OF THE LEGES *Julia* AND
Papia.

479. Constantine did not confine himself to innovations on the *jus publicum*, but extended them also to the *jus privatum*. He moderated, in several respects, the *patria potestas*. Thus he no longer permitted the father to sell his child except at the moment of his birth, and when he was forced to it by extreme poverty. He granted to the officers of the palace (*palatini*), although they were the sons of a family, the exclusive ownership of the property they had obtained at the court, as if they had acquired it in the army: this is the origin of the *peculium*

¹ *Notitia dignitatum Orientis et Occidentis*.

quasi castrans. He withdrew from the father the ownership, and only left him the usufruct, of the goods which the son of the family held from his mother. This, also, is the origin of the *peculium*, which was called afterwards *peculium adventitium*. On these points, and on a few others which cannot find their place in so brief a summary as this is, it is impossible not to observe the influence of Christianity, which had now become direct and powerful.

480. But where this influence is especially observable is in the abrogation which Constantine made of the incapacities to receive legacies, a burden laid by the *leges Julia* and *Papia Poppæa*, upon the *cælibes* and *orbi*. The Christian religion, which did not approve of second nuptials, and honoured, as a meritorious sacrifice, celibacy, to which it called its most zealous neophytes, and a very numerous class of persons, could no longer tolerate those relics of the past. We possess the constitution by which the Emperor Constantine abrogated these penalties in an article of the Theodosian Code, with this heading: *De infirmendis pœnis cælibatus et orbitatis*. The emperor desired that those who were styled *cælibes* should be liberated from the penalties imposed on them by those laws, *imminentibus legum terroribus liberentur*, that the status known as *orbis* should disappear, as well as the penalty inflicted on that condition, and that everyone should enjoy an equal capacity to receive testamentary gifts, *sitque omnibus æqua conditio capessendi*. He extended the same provisions to women. But, on account of the risk of undue influence between man and wife, he expressly reserved from the husband, as to their capacity to inherit from one another, the operation of the caducary laws.¹ Among the

¹ "Qui jure veteri cœlibes habebantur, imminentibus legum terroribus liberentur, atque ita vivant ac si numero maritorum matrimonii fœdere fulcirentur, sitque omnibus æqua conditio capessendi quod quisque mereatur. Nec vero quisquam orbis habeatur: proposita huic nomini damna non noceant. § 1. Quam rem et circa feminas æstimamus, earumque cervicibus imposita juris imperia, velut quædam juga solvimus promiscue omnibus. § 2. Verum

hujus beneficii maritis et uxoribus inter se usurpatio non patebit, quorum fallaces plerumque blanditiæ vix etiam opposito juris rigore cohibentur, sed maneat inter istas personas legum prisca auctoritas." Cod. Theod. lib. viii. tit. 16, *De infirmendis pœnis cælibatus et orbitatis*, const. Constantine, A.D. 320. The same constitution, with the exception of clause 2, which was suppressed in consequence of the change of legislation on that point, is found in the

conditions, the fulfilment of which would ensure to the consorts full capacity, was the existence of a common child.¹

481. It is still a debated question whether this constitution effected the suppression of the privilege of paternity in the claim to the *caduca* or *quasi caduca*, and whether jurisprudence drew this conclusion from it, or whether some subsequent constitution had specifically decreed it. Many of our modern jurists are of opinion that this privilege of paternity survived the legislation of Constantine and of subsequent emperors, and continued up to the time of Justinian. This opinion is very generally accepted; it is, however, impossible for us to share it.

482. Without doubt a distinction can be made between punishments and rewards. It is true the constitution of Constantine speaks of one and not of the other; but great changes in manners, and especially in creeds and religious practices, are always attended with proportionate results. In a state of things like that which existed when this constitution became law; when society had been leavened by Christian principles, when testamentary bequests were commonly made to churches, religious corporations, bishops, and other ecclesiastics; when the practice of devoting oneself to a life of chastity by religious vows was held in honour and respect, in such a state of society what could be the meaning of a privilege conferred on heirs or legatees having children, to the detriment of those who had not any? or what had become of the abolition of the distinction between the *cælibes* and the *orbi*, every vestige of which it was Constantine's desire to efface. The laws of Augustus, already more than once amended, had had their day.

code of Justinian, lib. viii. tit. 58, *De infirmis penis cælibatus, orbitatis, et de decimariis sublati*, under the name of the children of Constantine, A.D. 339; but it is asserted by the historians that Constantine was the first author of it, and that the code Theodosian is right.

¹ "Aut si filium filiamve communem habeant." *Regulæ* Ulp. tit. 16, *De*

solidi capacitate inter virum et uxorem. We have in this article of the *Regulæ* of Ulpian, and in that which precedes it (tit. 15, *De decimis*), detailed indications on the limits of the capacity which husband and wife had to receive legacies from each other, and on the various conditions the fulfilling of which would confer that capacity in its entirety.

483. It is to be remarked that neither in the code of Theodosius, nor in that of Justinian, is there a single constitution, nor indeed any mention at all, however slight, of the right of the *patres* to claim the *caduca*. This silence is very significant, especially in the code of Theodosius; for if it were true that, under this emperor, this right was still in vogue, this absence of every trace of it could no longer be attributed, as it may be in regard to the epoch of Justinian, to interpolations or to suppressions designedly made. We may remark also that, even in the constitution of Justinian, in which that emperor removes the last vestiges of legislation concerning the *caduca*, he does not mention the privilege of the *patres*; and yet, in that long constitution *De caducis tollendis*, he formally declares, and that in many places, that he is about to make a complete exposition of the laws then existing, so that it may be well known what was abrogated or reformed (*ut quod tollitur, vel reformatur non sit incognitum*).¹ This exposition, which is long and enters into detail, was one of the sources whence we derived our information about the *caduca* before the discovery of the Institutes of Gaius. But the word *patres* does not occur in it. So that, in fact, there is no allusion to what would certainly have been the greatest change that the constitution could have produced in society as to testamentary bequests. So far as regards the epoch of Justinian the proof is complete, and I do not see that these arguments can be met.

484. It must be admitted that the *jus liberorum* continued to be solicited from the emperors after Constantine, and granted by them as an individual favour; and it must also be admitted that the constitution of Honorius and of Theodosius runs in these terms: "*Nemo post hæc a nobis jus liberorum petat, quod simul hac lege detulimus*."² This is not so general as it might

¹ Code, lib. vi. tit. 51, *De caducis tollendis*, const. Justinian, A.D. 534: "§ 2. . . Consentaneum est et tempora eorum, et nomina manifeste exponere: ut quod vel tollitur, vel reformatur non sit incognitum. . . ." "§ 10. Necessarium esse duximus omnem in-

spectionem hujus articuli latius et cum subtiliori tractatu dirimere, ut sit omnibus et hoc apertissime constitutum."

² Code Theod. lib. viii. tit. 17, *De jure liberorum*, constitution 3 of Honorius and of Theodosius, A.D. 410.

be supposed to be, if it is separated from what precedes and from what follows it; but we must know to what this *jus liberorum* applied. I shall point out three instances of this application which had survived the legislation of Constantine, whose history it is interesting to trace.

1. It applied to the capacity of husband and wife to receive legacies from one another. The existence of a common child gave this capacity. Constantine, acting from the motives which have been already explained, by an express reserve retained on this point the provisions of the *lex Papia*. The husband and wife whose union was without issue continued to solicit for this purpose from the emperors the *jus liberorum*. Arcadius and Honorius, A.D. 396, first ameliorated their condition by deciding that neither age nor time should be any longer an impediment to their prayer being granted, but that it should be sufficient for them, to entitle them to solicit the concession, that they had the misfortune of despairing of issue.¹ Fourteen years afterwards, Honorius, with Theodosius, completed that reform: whether they had or had not any children (*quamvis non interveniant liberi*), full capacity was restored to the husband and wife to make to each other testamentary bequests as their feelings dictated.²

2. It was applied to the right of mothers to succeed to their own children. The question is not here about testamen-

¹ Code Theod. lib. viii. tit. 17, constitution 1, Arcadius and Honorius, A.D. 396: "Sancimus, ut sit in petendo jure liberorum sine definitione temporis licentia supplicandi, nec implorantium preces atas vel tempus impediatur, sed sola miseris ad poscendum auxilium sufficiat desperatio liberorum."

² Code Theod. lib. viii. tit. 17, constitution 2, Honorius and Theodosius, A.D. 410: "In perpetuum hac lege decernimus, inter virum et uxorem rationem cessare ex lege Papia decimarum, et quamvis non interveniant liberi, ex suis quoque eos solidum capere testamentis, nisi forte lex alia imminuerit derelicta. Tantum igitur post hæc maritus vel uxor sibi invicem derelinquant, quantum superstes amor exegerit." It is in the latter part of this constitution

that the prohibition occurs, made by these same emperors, forbidding any application to them for the future for the *jus liberorum*, since they had granted the concession generally. Cujas and Godefroy were perfectly right in saying that the only thing referred to in this constitution was the *jus liberorum* between husband and wife; the provision is quite clear. But we must go further; all this article of the code Theodosian, *De jure liberorum*, relates to that same question; the four laws which compose it, from the first to the second, have no other sense, meaning or application; it is sufficient to note the terms used in connection with the whole context from the first to the fourth to be convinced of this.

tary bequests, but about succession *ab intestato*; not about the *lex Papia*, which had remained extraneous to it, but about the *senatûs-consultum Tertullianum*, nearly one hundred and fifty years later, under Antoninus Pius. According to civil law no right of civil and reciprocal succession existed between the mother and her children, since between them, unless the mother had not passed *in manu viri*, there was no agnation. The object of the *senatûs-consultum Tertullianum* was not, therefore, to restrict the right of the mother; it was to create for her one which she had not before. This new right was only given to those who might have had a certain definitely expressed number of children; a single child was not sufficient, as in the preceding case: three was the number necessary for the *ingenue*, four for the enfranchised. But it was not necessary, as in the preceding case, that the children should still be living; it was sufficient that the mother should have borne them. They reckoned by the confinements (*ter, quaterve enixa*). Thus in this case the *jus liberorum* was a very different provision from the preceding one. It was also occasionally solicited and obtained from the emperor as a favour, in individual cases, although the conditions that gave a title to it were not fulfilled. The constitution of Constantine, on the abrogation of the penalties upon *cælibes* and *orbi*, had no connection with those special rules regulating the succession *ab intestato*. One year afterwards, however, Constantine moderated the operation of it by giving to the mother who had borne no other child than that whose succession was under question, the right of succeeding *ab intestato* to a third portion.¹ To obtain a larger share, this kind of *jus liberorum* continued therefore to be solicited. It was only Justinian who suppressed all these conditions of multiplied confinements, and rendered those solicitations for the future unnecessary.²

3. It applied to dispensations from guardianship and trusteeship as well as from the other offices which might be avoided by the man who had, in Rome, three children living, in Italy

¹ Code Theod. lib. v. tit. 1, *De legitimis hæredibus*, 1, constitution of Constantine, A.D. 321.

² Code Just. lib. viii. tit. 59, *De jure liberorum*, 2, constit. Just. A.D. 528.

four, and in the provinces five. This is another kind of *jus liberorum*, derived from the *lex Papia*, and one which was retained under Justinian.

485. It is clear then that there is no argument to be drawn against our conclusion, from the fact that the *jus liberorum* continued to be solicited as an individual favour after Constantine's time and even until the reign of Justinian; the important point is to distinguish what kind of *jus* is meant, and not to misapprehend it. There was no reference whatever, either in the conditions, in the aim, or in the intention of this constitution, to the *jus liberorum* which gave to the beneficiaries or legatees, married and having at least one legitimate child at the time of the opening of the will, a claim to the *caduca* or *quasi caduca*; of the existence of the latter, subsequently to Constantine and even before, no trace is to be found.

486. We now proceed to consider the main basis upon which the opinion, that we feel it our duty to contravene, rests. This is a passage in the constitution of Justinian, *de caducis tollendis*, in which the emperor exhibits his sense of justice and moderation, in that, while he knows that his *fiscus* stands as the last claimant to caducal portions (*ultimum ad caducorum vindicationem vocari*), he does not hesitate to sacrifice and renounce his right.¹ Whence the conclusion, so it is said, that, inasmuch as the *fiscus*, even at this period, came in as last claimant, Caracalla had not called it in to the exclusion of all; and that Constantine had not abrogated the privilege of the *patres*; but that this privilege was maintained and exercised till the time of Justinian. In our opinion the explanation is as follows. Caracalla, in his fiscal legislation, made the *fiscus* claimant of all the *caduca*. The reaction which took place in subsequent reigns resulted in the abrogation of the constitution of Cara-

¹ Tantum etenim nobis superest clementiæ, quod scientes etiam fiscum nostrum ultimum ad caducorum vindicationem vocari, tamen nec illi peperimus, nec Augustum privilegium exercemus: sed quod communiter omnibus

prodest, hoc (rei) privati nostræ utilitati præferendum esse censemus, nostrum esse proprium subjectorum commodum imperialiter existimantes." Cod. Just. 6, 51, *De caducis tollendis*, constit. Just. § 14.

calla and restored matters to the *status quo ante*, and the privilege of the *patres* was re-established. Constantine suppressed the penalties on the *cælibes* and *orbi*, the very mention of which distinctions he desired to blot out of the statute book, and gave to all an equal right of taking under wills. (*Sit omnibus æqua conditio capessendi quod quisque mereatur.*) Then, without any further distinction being made, irrespective of the fact whether men were unmarried or not, whether they had children or not, all were permitted to take what was bequeathed to them; but if there were any conditions unfulfilled, then the *caduca* or *quasi caduca* were to be claimed according to the provisions of the *lex Papia*. It was the claim to the *caduca* which belonged to all, without privilege for any one; the treasury came last. The ancestors or descendants of the testator, to the third degree, retained the *jus antiquum* or the ancient right of accretion. Justinian put an end to all the complications and obscurities between the claim of the *caduca* or *quasi caduca* on the one hand, and the *jus accrescendi* on the other. And, while he borrowed from it, he suppressed what he calls the *caducorum observatio*, but restored the *jus antiquum* to all.¹

487. The reader may observe to what the exceptional causes of lapse in testamentary dispositions, introduced by the *leges Julia* and *Papia*, were reduced after the constitution of Constantine. In reality, by the removal of the disqualification of *cælibes*

¹ "Et quemadmodum in multis capitulis lex Papia ab anterioribus Principibus emendata fuit, et per desuetudinem abolita: ita et a nobis circa caducorum observationem invidiosum suum amittat vigorem . . . Et cum lex Papia, jus antiquum, quod ante eam in omnibus simpliciter versabatur, suis machinationibus et angustiis circumcludens, solis parentibus et liberis testatoris usque ad tertium gradum, si scripti fuerant hæredes, suum imponere jugum erubuit, jus antiquum intactum eis conservans: nos omnibus nostris subjectis sine differentia personarum (hoc) concedimus." No explanation will account, as this does, for all this constitution *De caducis tollendis*, considered either in its entirety or in each of its

details. Independently of what concerns the suppression of the provisions by which the time of the opening of the will had been substituted for that of death, by the *lex Papia*, sole cause of exceptional lapse which still existed and which Justinian removed, we see that the tendency of this constitution was to regulate anew the *jus accrescendi* and the results arising from various joinders of beneficiaries, by substituting for all, this *jus accrescendi* to the *caducorum vindicatio*, without a single word indicating that this *vindicatio* was not itself already general, but, on the contrary, distinctly declaring that without distinction it had reference to all.

and of *orbi*, they had almost all disappeared; that arising from the restriction of the capacity to receive the legacies from a husband or wife disappeared under Honorius and Theodosius; so that, except the greater liability to forfeiture resulting from the period for the lodging of claims having been extended by the *lex Papia*, from the death of the testator to the opening of the will, the causes of those forfeitures had again become the same as those which were sanctioned by the civil law: the death of the heir or legatee, his refusal to accept, the loss of his rights of citizenship, the non-accomplishment of the condition imposed—these are, in fact, the only causes of lapse cited by Justinian in his *Constitutio de caducis tollendis*. Indeed, in these circumstances to suffer the beneficiary or legatee who alone had children to lay claim to these shares in case of default would not only be to maintain the idea of a recompense which no longer existed, either in the manners or in the spirit of the times, but it would have been to maintain the penalties against *cælibes* and *orbi*, which Constantine had desired to suppress, for from whom would the *patres* have taken these lapsed portions? Clearly from the *cælibes* and *orbi*, to whom the testator had bequeathed them. But, on the contrary, we may say that each having an equal capacity to receive that which might fall to him (that is the way in which we translate *quod quisque mereatur*), each is called to make the *vindicatio* in connection with the lapsed or quasi-lapsed portions, only observing the order and the rules established by the *lex Papia*. This, in our opinion, is the spirit and meaning of the constitution of Constantine. The meaning appears to us to be expressed in the terms of the constitution, and at all events interpretation and use placed this signification upon it. We know that Justinian does not merely represent the *lex Papia* as having been amended in various parts by imperial constitutions of a later date, but represents it as having been abolished by disuse (*et per desuetudinem abolita*).



SECTION XCIV.

AGRICOLÆ OR COLONI.

488. Before proceeding farther with the history of the emperors, it is necessary to take notice of a particular class of men who differed, as to their legal status, both from free men and from slaves, properly so called. These men had been introduced not only into the remote provinces, but into every portion of the empire, even to its centre, and into Italy. Their origin and their existence is anterior to Constantine. Our reason for only referring to them at this time is, that the laws concerning them, at least so far as they are known to us, are not of earlier date. These men were called *agricolæ*, or, at other times, *coloni*, because they were chiefly destined to the cultivation of the soil. This designation had been in use amongst the Romans, in a general sense, long before it came to have a technical signification, indicating a servile condition. It is the same with the term *inquilini*, which imports at the same time the notion of residence upon the land and its culture. Slavery, such as it was among the ancient Romans, had begun to undergo a transformation, and serfdom had come into existence. Coexistent with the condition of service of man to man, there grew up the condition of service of man to the land.¹

489. The colonies were divided into two classes, the respective appellations of which are frequently confounded; the one, nevertheless, is more frequently termed *servi censiti*, *adscriptitii* or *tributarii*, the other, *inquilini*, *coloni liberi*, and sometimes they are indifferently called *coloni*. This incident is common to all the *coloni*, that they were attached in perpetuity to the land they cultivated; they could not abandon it in order to take up their residence elsewhere; their masters could not transport them from one place to another, and when the land was sold they fell of necessity into the hands of the purchaser. This is the servitude of the soil, and the origin of our ancient serfdom.

¹ See Cod. Theod. lib. v. tit. 9, *De fugitivis colonis, inquilinis et serris*; tit. 10, *De inquilinis et colonis*; tit. 11, *Ne colonus inscio domino suum alienet*

peculium vel litem inferat ei civilem. Also Cod. Just. lib. xi. tit. 47, *De agricolis et censitis et colonis*, et seq., 49, 50, 51 and 52.

The difference between these two classes of *coloni* consisted in that the *servi censiti*, *adscriptitii* or *tributarii*, more closely resembled slaves proper: their origin was slavery, their condition having been modified into that of colonists from the necessity of cultivating the land; they had no property of their own, and their *peculium*, like that of ordinary slaves, belonged to their masters.¹ The name of *censiti*, *adscriptitii* or *tributarii* was given to them from the fact that their names were inscribed in the census as *servi coloni*, and as subject to the payment to the *fiscus* of a capitation or poll tax.² As to the proprietor of the land, as they were his slaves and as their *peculium* belonged to him, his chief duty was to provide them with the necessaries of life and labour, the matter of their remuneration being of little importance. These *coloni* and their families, in fact, lived on the land and its products.

The *coloni liberi* or *inquilini*, sometimes termed simply *coloni*, more closely resembled the class of free men. They had their origin in freedom, and it was rather the necessity of living, and the desire to obtain concessions of land to cultivate, which had induced them, or their ancestors, to accept this concession upon the condition of being *coloni*, which they accepted in lieu of their former liberty. They could hold property of their own, whether moveable or immoveable; it belonged to them and not to their masters. But they owed to their masters a species of annual rent (*canon*, *reditus*), which was paid either in kind or in money.³ This rent could not be increased beyond certain limits.⁴ Although they were in a certain sense free, in another they were in fact in a state of slavery.⁵ These *coloni liberi* were always inscribed in the census for the poll tax, or capitation, and for the purposes of a land tax.⁶

490. To what cause must this new form of human servitude

¹ *Alii sunt adscriptitii et eorum peculia dominis competunt* (Cod. 11, 47, *De agricolis et censitis et colonis*, 19 const. Theod. and Valent.).

² *Ibid.* const. 10, Valent. and Valens.

³ *Alii coloni sunt, liberi manentes cum rebus suis, et ii etiam coguntur terram colere et canonem præstare*

(Cod. *ibid.*).

⁴ Cod. 11, 47, *De agric.*, 23, § 1, const. Justinian.

⁵ *Ut licet conditione videantur ingenui, servi tamen terræ ipsius cui nati sunt existimantur* (Cod. 11, 51, *De colonis Thracensibus*).

⁶ *Ibid.* 4, const. Valent. and Valens.

be ascribed? Agriculture had been carried on from the latter days of the republic, and particularly under the empire, by troops of slaves, transported to and maintained upon, the land. The failure of this system, and in many instances the total abandonment of extensive estates, was, in proportion as the taxation was extended to Italy, becoming more and more onerous, and the proprietors preferred to leave the land uncultivated rather than to pay the tax. The depopulation of entire districts, which resulted from this state of things, was the cause which, under the empire, gave rise to the various customs or institutions of these times; the object of which was, so it would appear, the cultivation of the soil, whether by the proprietor himself or by third persons, who were interested in it. Amongst these was the colonist, who was bound to the land by a bond that neither he nor his master could break, destined to an agricultural life, and burdened with an impost due to the state and a rent due to his master. As a return, he enjoyed the life and some of the rights of family; was entitled to the surplus products of his labour, and to all his acquisitions, as a species of *peculium*, and even to some as property. His position tended to solve the difficulty of at the same time satisfying the state, the proprietor, and the labourer; for this serfdom was freedom from a worse condition. In this way we see how the personal servitude of the slave, when employed upon the culture of the land, was transformed into a territorial servitude; we see the wretched condition of the agriculturist and the miserable terms on which men were then willing to undertake the cultivation of the soil.

491. We read in a fragment of Scævola, as also in many other writers, that there was a question even at that time about *mancipia*, *villici* and *coloni*, attached by the master to the culture of his land, but we learn from the point submitted to the jurist, and resolved by him, that at that time colonists were not persons who were attached to and could not be separated from the soil, even by the will of the master, for it was the provisions of a will, by which these persons were bound, *cum fundo instructo*, and upon the interpretation of the will the jurist had to rely,

in order to determine whether the legatee of the estate ought or ought not to have the *coloni*.¹ We see also in the *Sententiæ* of Paul, that it was a question whether the master could transfer them from one estate to another.² We have, however, undoubted traces at this same period, in certain passages of Marcian, of Ulpian, and perhaps of Paul himself, of the existence of these *coloni*;³ whence we must conclude that this mode of culture, following the arrangements made by the masters, although not general, had nevertheless been introduced.

Salvian, who wrote in Gaul at the commencement of the fifth century, in his book, *De gubernatione Dei*, refers to the case of freemen reduced by misery to the necessity of becoming the *coloni* of the wealthy, giving up their liberty, and submitting themselves to the condition of *inquilini*.⁴

To this we may add the fact that in the distant provinces which had been conquered by the imperial arms, this species of agricultural servitude would be more useful than the ancient form of the slavery of captives, and also the fact that history and the constitutions themselves afford instances of the transportation of tribes of conquered barbarians to lands to which they were attached in the condition of *coloni*. To this effect is the constitution of Honorius, discovered in our own time by M. Peyron, amongst the fragments of the Theodosian code.⁵

¹ Dig. 33, 7, *De instructo vel instrumento legato*, 20, pr. f. Scævola.

² Paul, *Sentent.*, 3, 6, *De legatis*, § 48.

³ "Si quis inquilinos sine prædiis quibus adhærent legaverit: inutile est legatum." Dig. 30, *De legatis*, 1, 112, pr. f. Marcian. "Si quis inquilinum, vel colonum, non fuerit professus, vinculis censualibus tenetur." Dig. 50, 15, *De censibus*, 4, § 8, f. Ulp.; "... Nisi ex his (servis) aliqui perpetuo ad opus rusticum transferantur." Paul, *Sentent.*, 3, 6, *De legatis*, § 70. See also Dig. 27, 1, *De excusationibus*, 17, § 7, a frag. of Callistratus.

⁴ "... Fundos majorum expetunt, et coloni divitum fiunt. . . . jugo se inquilinæ abjectionis addicunt, in hanc necessitatem reducti, ut extorres non facultatis tantum, sed etiam conditionis suæ . . . , et jus libertatis amittant."

Salv., *De gubernatione Dei*, ch. 8.

⁵ Cod. Theod. 5, 4, *De bonis milit.*, const. 3, Honorius: "Scyras barbaram nationem . . . imperio nostro subegimus. Ideoque damus omnibus copiam ex prædicta gente hominum agros proprios frequentandi; ita ut omnes sciant, susceptos non alio jure quam colonatus apud se futuros: nullique licere ex hoc genere colonorum ab eo cui *semel* adtributi fuerint vel fraude aliqua abducere, vel fugientem suscipere; poena proposita quæ recipientes *alienis* censibus adscriptos vel non proprios colonos insequitur.

"Opera autem eorum terrarum domini libera *utantur*, ac nullus subacta peræquationi vel censui *subjaceat*: nullique liceat velut donatos eos a jure census in servitutem trahere, urbanisve obsequiis addicere."

492. The condition of *coloni*, at first the result of necessity, was perpetuated by nature, inasmuch as the children inherited the status of their parents. Prescription might also drive a citizen from the condition of a free man to that of *colonus liber*, if during a period of thirty years he had been considered as occupying that position and had paid an annual rent.¹ The servitude thus once incurred extended to his entire posterity. Thus were the noble principles of ancient Rome forgotten: the principle that liberty is inalienable: the principle that liberty is imprescriptible.

EMPERORS.

A.D. 337. CONSTANTINE 2nd, CONSTANTIUS and CONSTANS.

„ 340. CONSTANS and CONSTANTIUS.



SECTION XCV.

SUPPRESSION OF THE FORMULÆ (*De Formulæ sublati*).

493. That rigid adherence to form and observance of symbolic terms which had characterized the early period of Roman law had disappeared at the time at which we have now arrived. The law, too, following the progress of society, had lost its material character; the *actiones legis* had been suppressed under the republic, and after the time of Diocletian even the formula system had been abandoned, and no such thing was now known as the loss or failure of a suit from the simple misapprehension or misapplication of a term. Such, for example, as the words formerly necessary to be applied in stipulations and promises in dower, or in the institution of heirs, or legacies distinguished according to the terms employed into four classes: in the formal acceptations or *cretiones* of inheritances, in the *cessiones in jure*, in manumissions, emancipations, adoptions, and in other acts peculiar to the Roman civil law. These were all technical and sacred forms, the total abolition of which in all acts was effected by the Emperor Constantius, A.D. 342, who considered

¹ Cod. Just. 11, 47, *De agricolis*, 18, const. Anastasius; 23, § 1, const. Just.

them verbal snares, apt to mislead. "*Juris formulæ, aucupatione syllabarum insidiantes, cunctorum actibus radicitus amputentur.*"¹ These are the terms of the constitution, but the actual extent of change produced by it is not known to us, because this suppression had been gradually taking place long before any enactment was passed concerning it; and indeed a constitution of Constantine the 2nd, A.D. 339, had abolished the necessity of all symbolic formulæ, in the institution of heirs, grants of legacies, and generally in testamentary documents.² The rescript of Constantius extended and generalized this abolition to all legal formulæ (*Juris formulæ, cunctorum actibus*). It must not, however, be understood that the use of given words in contracts was dispensed with, as, for example, in the case of the contract *verbis*. All that resulted from the enactments was, that words were deprived of the symbolic meaning and force previously attached to them, and the use of any words or terms was permitted that were sufficient to convey and express the ideas and intentions of the parties.

494. It was Constantius who ordered the pagan temples to be closed, and attached to pagan sacrifices the penalty of death and confiscation.³ Heretics, apostates, Jews and Gentiles were subjected to disabilities and often to cruel punishment; indeed the Christian religion had become a religion of persecution. What can we expect from an age in which Constantine the Great condemned to the stake the *aruspices*, the pontiffs who predicted the future, the magicians who by their sorceries sought to bring calamities and even death upon men? What can we expect from Constantius, who, a few years later, revived all the laws of his father against the imaginary criminals, whom he was pleased to style the *communis salutis hostes*? Amongst these culprits we find classed the mathematicians. But in this category were included men who, by the aid of mathematics and the study of

¹ Code 2, 58, *De formulis et impetrationibus actionum sublati*, 1. This constitution is entitled by Constantine, but its date, A.D. 342, and the indication of the consulate, show that it belongs to the time of Constantius.

² Cod. 6, 23, *De testamentis*, 15 const. Constantine II.; 6, 37, *De legatis*, 21 const. Constantine II.

³ Cod. 1, 11, *De paganis, et sacrificiis*, 1 const. Const. A.D. 342.

the stars, pretended to read and to determine the future, and not those who simply studied geometry, for both Diocletian and Maximian had declared this science to be useful to the state.¹

EMPERORS.

A.D. 350. CONSTANTIUS and MAGNENTIUS, A.A. — GALLUS, Cæsar.

A.D. 353. CONSTANTIUS, alone. — AUGUSTUS GALLUS, Cæsar.

A.D. 355. CONSTANTIUS, alone. — AUG. JULIAN, Cæsar.

It was about this period, A.D. 360, that Constantius established at Constantinople a *præfectus urbi*, answering to the same office at Rome.

EMPEROR.

A.D. 361. JULIAN, A.

495. Julian is one of those great characters that occasionally enliven the page of history and break the monotony of its narration. When Cæsar he repulsed the barbarians of Germany. When Augustus he adorned the throne of the empire by his justice and by his simplicity, he respected the consuls and honoured the magistrates. He swept out of the imperial palace the crowd of salaried valets with which it was beset. Equally just was he when, laying aside for a time the sceptre and the sword, he took up the pen to indite, for the benefit of posterity, clever satires upon the effeminacy and corruption of his subjects, or to give expression to his grand conceptions and philosophical speculations. At another time, burning with desire to avenge the honour of the empire, he boldly led his armies into distant and unknown countries; and destroying his ships, so that his soldiers might have no resource but victory, he pursued Sapor, the dreaded enemy of Rome, into the very heart of his kingdom. Again we behold him, magnanimous amid misfortunes, deceived by a deserter and wandering over vast deserts, rallying his desponding troops, distributing among them his own provisions, supporting without a murmur hunger and thirst, and, finally, when borne wounded from the battle-field to

¹ Cod. 9, 18, *De maleficiis et Mathematicis*, 2 const. Diocl. and Max.

his death bed, calmly holding discourse with his officers who crowd around him, recounting the history of his life, and then breathing his last with the dying request upon his lips that they would select a successor worthy of the empire.

We cannot, however, clear his memory from the reproach of actions which procured for him the title of the apostate, for Julian was the originator of an attempt to restore polytheism. To weaken the Christian religion, to revive the worship and to restore the altars of the gods of the republic, was the object of his desires. His intellect was far too great to lead him to adopt this course from conviction. In his view religion was nothing more than a political engine. Even from this point of view he was mistaken. He attempted to replace the empire upon the basis of its ancient institutions, to restore the *jus publicum*, the *jus sacrum*, the deities of old Rome, and all its past associations. It may be the amusement of a philosopher to dream about theories of government; but an emperor should avoid such a pastime. It is his duty to study the nation he governs, and to establish its institutions upon the basis of the moral condition in which he finds his people. The whole situation of the empire, the vast number of Christians, the public veneration with which their religion was regarded, the ridicule and contempt which had been thrown upon polytheism and the old deities,—all this ought to have shown Julian that it was impossible for him to stem the tide of events, and that any innovations which he might succeed in establishing by force would be annulled, by the action of public opinion, directly he was dead, and that nothing but mischief could result from the attempt. It must be admitted, however, that the evil results which might naturally have been looked for, from such a course of policy, were greatly modified by the moderation he evinced: for, however desirous he may have been to check the progress of Christianity and to arrest its influence on politics, he was never guilty of persecution.

The reign of Julian was not of long duration. After his premature death the army nominated Jovian his successor, who immediately restored the Christian religion throughout the whole empire.

EMPERORS.

A.D. 363. JOVIANUS.

,, 364. VALENTINIANUS 1st and VALENS, A.A.

,, 367. VALENTINIANUS 1st, VALENS and GRATIANUS.

,, 375. VALENTINIANUS 2nd, VALENS and GRATIANUS.

,, 379. VALENTINIANUS 2nd, THEODOSIUS 1st and GRATIANUS.

,, 383. VALENTINIANUS 2nd, THEODOSIUS 1st (384), ARCADIUS (son of THEODOSIUS, declared Augustus).

,, 392. THEODOSIUS 1st, ARCADIUS.

,, 393. THEODOSIUS 1st, ARCADIUS, HONORIUS (son of THEODOSIUS, declared Augustus).

SECTION XCVI.

THE DEFENSORES CIVITATUM.

496. These municipal magistrates were appointed in each city, mainly with the view of protecting the inferior orders of the inhabitants who were unable to protect themselves. The first constitutions, so far as we know, existing upon this subject, are those of Valens, Valentinian and Theodosius. It is however possible that these offices were in existence before. They were elected by an assembly composed of bishops, members of the *curia*, proprietors and distinguished citizens. They held office for a period of five years, and they could not resign before the end of that period. It was their duty to take steps to prevent robbery, to denounce thieves to the judge, and to drag them before his tribunal. They had also a jurisdiction of their own in all matters of minor importance, that is to say, of matters which did not involve more than fifty *solidi*. But the most pleasing and useful part of their functions was to study the interests of the poor plebeians, to protect them from all oppression and injustice. "Show yourselves the fathers to the plebeians," said Theodosius and Valentinian to the *defensores* (*parentis vicem plebi exhibeas*), "it is your duty to guard them as your children" (*liberorum loco tueri debes*). This was a beneficent duty calculated to elevate the character of those to

whom it was entrusted, and one which should have insured to them respect and honour. But we gather from Justinian that the office fell into contempt and degenerated into an inferior post held by subordinates of the magistrates, against whom it was the duty of the *defensores* to protect the poor, instead of which they were ready to obey the very nod of the magistrates.¹ It seemed as if the Romans were no longer capable of realizing the noble and the generous.²

SECTION XCVII.

THE DIVISION OF THE EMPIRE.

497. For a long time, as we have already seen, several emperors, with the title of Augustus, divided the imperial power between them. Hitherto, however, the empire had been undivided, and it was merely the provinces which were apportioned. Theodosius, before his death, literally divided the state between his two sons, and upon his death the Roman world was split up into two distinct empires, which, notwithstanding the fact that they were upon the whole governed by the same laws, can no longer be considered as one.

EMPERORS.	
<i>The West.</i>	<i>The East.</i>
A.D. 395. HONORIUS.	A.D. 395. ARCADIUS.
„ 408. THEODOSIUS 2nd.	„ 423. JOHN (<i>Joannes tyrannus</i>).
	„ 425. VALENTINIANUS 3rd.

SECTION XCVIII.

THE PUBLIC SCHOOLS OF CONSTANTINOPLE AND OF ROME.

498. A school was already in existence at Rome, when Theodosius established one at Constantinople, A.D. 425. His

¹ Just., *Nov.*, 15, preface.

² Cod. 1, 55, *De defensoribus civitatum*.

constitution, which was published under his own name and that of Valentinian, laid down certain rules concerning the instruction which it is well to note. It established professors, whose duty it was to give instruction in the public courts, sometimes teaching Latin rhetoric and grammar, at others Greek grammar and rhetoric; there was one for philosophy and two for jurisprudence. This constitution, while it conferred upon the professors the right of giving public instruction, prohibited them from giving private, and on the other hand prohibited all who were not authorized from giving public instruction; but those who were thus prohibited from giving public instruction were at liberty to give private.¹

SECTION XCIX.

THE RESPONSA PRUDENTUM—LEX DE RESPONDIS PRUDENTUM.

499. A.D. 426. We have now reached the last regulation of the lower empire concerning the authority of the jurists. The first step which bound the judges in this respect was made by Adrian, when he ordered them rather to count than to weigh the *responsa prudentum*. This direction was, however, well fenced, and the judges were only bound where there was unanimity of opinion; where this did not exist they were free to elect.² Constantine, when he invalidated the notes of Ulpian and Paul upon Papinian, did not change the rule; he only desired by a legislative act to disentangle Papinian from the controversy, which had tended to obscure him, and he in this way aided the tendency which in fact then existed to give to the dicta of Papinian authority in all cases where there was a difference of opinion.³ Such was the condition of things till the period at which we have now arrived, that is to say, for more than a century after Constantine; but this rule requiring unanimity in so great a number of opinions, collected from

¹ Cod. Theod. 14, 9, and Cod. Just. 11, 18, *De studiis liber. urbis Romæ et Const.*

² See § 389.

³ See § 456.

different and remote periods, and in default of unanimity leaving the judge free to act, was altogether behind the then state of legal knowledge. The science had decayed step by step, and the ancient jurists were becoming farther and farther removed. It became necessary to concentrate and reduce. It was clearly necessary with regard to the imperial constitutions, and it soon became equally evident that it was as necessary with regard to the works of the jurists. There was a desire to meet this want, and to facilitate the task which fell upon judges, suitors and advocates, by limiting the collective body of legal opinions to the works of a comparatively small number of authors, who were the best known, and who were designated by name; on the other hand it made them mere machines. These were the final results of a vicious principle which attributed to the opinions of accredited jurists the force of law, instead of allowing those opinions to rest upon their legitimate basis—the power of science and intellect. These were the last fruits developed in the course of time and general decay from the seeds which the despotism of Augustus had first sown, when he constituted a class of official jurists. It ended in their becoming *conditores legum*. This new rule is contained in a constitution which it is customary to call the *loi des citations*, or *lex de responsis prudentum*, and which has been preserved in the ancient fragments of the Theodosian code, inserted in the Breviarium Alaricianum, which emanated in fact from Theodosius the 2nd, A.D. 426. It was however first published for the western empire in the name of Valentinian, then an infant, and was subsequently enforced both in the east and in the west; the following are its provisions.

500. This constitution mentions by name five of the most celebrated modern jurists, Papinian, Paul, Gaius, Ulpian, and Modestinus; it declares that it confirms all their writings, so that Gaius has the same authority as either of the others. This principle is, as it were, the pivot upon which judges, litigants, advocates and the public had to turn.

As to the other jurists, the constitution confirms them, but only in those cases where the five jurists just mentioned had

introduced passages from them into their own works, such as Scævola, Sabinus, Julian, Marcellus and others, provided that the correctness of the quotation was ascertained by a comparison of manuscripts. This proviso was rendered necessary by the possibility of errors creeping into the old MSS. The works of these jurists and of those whose decisions they quoted, the accuracy having been secured by comparison of different MSS., were the authorities to which it was permitted to refer, to determine and solve all legal difficulties.

The constitution adds that the notes of Paul and Ulpian upon Papinian should continue to be held invalid, as they had been declared to be by Constantine, and it was necessary, inasmuch as the term *scripta universa*, which is general, had been employed, that the restriction also should be specified. As to the notes of Marcian, from the simple fact that nothing was said of them, they remained under the proscription, with which we know they had been branded by an enactment, the text of which we do not however possess.

501. The jurists whose works it was permitted to quote and whose opinions were thus supposed to be settled, having been fixed by law, the judge and the parties interested were bound by them, provided that if these authorities differed the majority determined the point; if they were equally divided, the opinion supported by Papinian was to prevail; and if the opinion of Papinian was not expressed the judge was at liberty to follow whichever he pleased.¹

¹ Cod. Theod. 1, 4, *De responsis prudentum*, 8; Imp. Theodosius et Valentinianus AA. ad Senatum urbis Romæ: "PAPINIANI, PAULI, GAI, ULPIANI atque MODESTINI scripta universa firmamus, ita ut Gaium, quæ Paulum, Ulpianum et cæteros, comiteatur auctoritas, lectionesque ex omni ejus opere recitentur. Eorum quoque scientiam, quorum tractatus atque sententiæ prædicti omnes suis operibus miscuerunt, ratam esse censemus, ut SCÆVOLÆ, SABINI, JULIANI atque MARCELLI, omniumque quos illi celebrarunt; si tamen eorum libri, propter antiquitatis incertum, codicum collatione firmentur. Ubi autem diversæ

sententiæ proferuntur, potior numerus vincat auctorum; vel si numerus æqualis sit, ejus partis præcedat auctoritas, in qua excellentis ingenii vir Papinianus emineat, qui, ut singulos vincit, ita cedit duobus. Notas etiam Pauli atque Ulpiani in Papiniani corpus factas, sicut dudum statutum est, præcipimus infirmari. Ubi autem pares eorum sententiæ recitantur quorum par censetur auctoritas, quod sequi debeat eligat moderatio judicantis. Pauli quoque sententiæ semper valere præcipimus." DAT. VII ID. NOV. RAVENNÆ, DD. NN. THEOD. XII ET VALENT. II. COSS. (426).

Several difficulties have in modern

We may well ask what the magistrates, judges and lawyers of that period were like when we find the duties of their respec-

times been started in Germany concerning this constitution, which, in our opinion, are of secondary importance, inasmuch as they in no way affect the general spirit of the history.

1st. The *lex de responsis prudentum* confirms and authorizes the quotation and calculation before the judge of the decisions of the five jurists whom it specifies, and of all other jurists quoted by them. Does the maxim apply, "*Qui dicit de uno negat de altero?*" Speaking generally, we answer in the affirmative; that is to say, no other jurists except those comprised within the terms of the constitution could be cited and counted. It is difficult to see how this can be disputed, inasmuch as this is the direct object of the constitution; but looking at the provisions of the constitution itself, as regards the older jurists, whose opinions are cited by the five select jurists, it may be a question whether all the works of the former are referred to, or only those passages which are quoted.

The text appears ambiguous; we are, however, of opinion that it refers solely to the passages cited; and, in addition to general reasons, we see direct proof of this in the necessity imposed by the constitution of verifying the correctness of the quotation by means of the comparison of manuscripts. In the dissertation of Puchta, in his *Cours d'Instituts*, par. 133, we do not see any opinion clearly expressed upon this point, nor is it certain that he is in fact referring to it at all. With regard to those jurists who are neither referred to directly or indirectly in the provisions of the constitution, it may be asked whether they were excluded by it? and was this the case with respect to those who had been amongst the number of the authorized jurists, or did they preserve their ancient authority? As opinions to be cited and reckoned, their authority was certainly not retained, but in a scientific point of view the case was different. The constitution could not affect their authority as individual writers. This question, however, does not in reality arise, because the decisions of the authorized jurists never had, in our opinion, the force of law, except so far as it was

given them by the provisions of the constitutions of Adrian, Constantine, and of Theodosius and Valentinian, all other documents were hypothetical and little known. Notwithstanding the argument and the quotation adduced by Puchta in support of this theory, that all the ancient jurists formerly authorized preserved their authority, he does not give it as his opinion that they could be quoted independently of the constitution; but he intimates that they were comprehended in the constitution. In effect, Puchta says, and I am of opinion that this is the only conclusion to be arrived at, that the only object of this law was to lessen the burden of the judges, and to restrain within certain limits the number and authority of the authorized jurists. Its sole object was to furnish an easy and practical means of determining which authorities should be recognized, and it specified the five jurists and those quoted by them, and the emperor was sure to comprehend all jurists who were really good authorities, and to exclude those who were not. We must not be misunderstood as saying that the five jurists never cited in their works any jurist except those authorized; this is extremely doubtful, and it is equally difficult to believe that they cited all those jurists who were in fact authorized. But be this as it may, whether we admit it or not, it does not come under consideration in the question as to the basis of the law; it is simply a question of intention. We adhere to what we have already said, and we find ourselves confirmed by Theodosius himself in connection with the publication of the Theodosian Code. (See § 502.)

The following is the expression used in the Breviarium Alarici, as well as in all the editions of the Theodosian Code: "*Hæc lex ostendit, quorum Juris conditorum sententiæ valeant. Hoc est Papiani, Pauli, Gaii, Ulpiani, Modestini, Scævole, Sabini, Juliani atque Marcelli. . . Scævola, Sabinus, Julianus atque Marcellus in suis corporibus non inteniuntur sed in præfatorum opere tenentur inserti.*" Apart from all uncertainty as to detail, this extract clearly shows the

tive offices reduced to mere compilation or comparison, and numerical calculation of legal opinions? Was this a legitimate application of the powers of reason and of learning? Assuredly the science of jurisprudence could not sink to lower depths of degradation. But it is to be observed that Justinian, in his Digest, discarded this numerical operation, giving to those whom he charged with the work of compiling the Digest free choice to select the opinions of the jurists, and even to adopt that of one in opposition to the many, and to use the notes of Paul, Ulpian and Marcian upon Papinian, notwithstanding the fact that they had been proscribed.¹

SECTION C.

THE THEODOSIAN CODE.

502. A.D. 438. In addition to the enactments of Theodosius upon the works of the jurists, to which we have just alluded, we have others enacted three years later, on the imperial constitutions. He took as a model (*ad similitudinem Gregoriani atque Hermogeniani Codicis*) the collection of rescripts methodically arranged and published under the title of codes, but without legislative authority, by Gregorianus and Hermogenianus, and which did not go below the time of Constantine; and he directed a similar collection of all the constitutions of Constantine and the succeeding emperors, including himself, com-

spirit in which this law was understood after it had been in application for eighty years.

2nd. The expression in the text is, "*Si tamen eorum libri.*" Does this relate to the works of the jurists specified, certain editions of which were to be referred to in order to ascertain that the text was correct; or to the works of the jurists cited by them, copies of which must be compared in order to verify the accuracy of the passage quoted? We are of the latter opinion, but though the question is not without interest it is most unimportant. In either case comparison is to be made. Puchta, who agrees with us in this

opinion, also thinks that the passages quoted are those alone which bear upon the point.

3rd. The third difficulty results from the mode in which reference is made to Gaius, "*ita ut Gaium . . .*, etc." Was it necessary for the emperor to insist upon Gaius being held to have this authority as well as the others? In certain parts of the empire this might be attended with some difficulty. Was Gaius in fact one of the authorized jurists? It appears that he was not; we have already referred to this in § 393.

¹ Just., *De conceptione Digest.*, § 6.

mencing from the period when the other collection left off, to be drawn up by two successive commissions under the superintendence of Antiochus, ex-consul and ex-prætorian præfect (*cunctas colligi constitutiones decernimus, quas Constantinus inclytus, et post eum divi Principes Nosque tulimus*). In the title of this collection we find set down the composition of the first commission which was appointed, A.D. 429, in which there were eight members of the rank of *illustres* or *spectabiles*, and a jurist styled *vir disertissimus et scolasticus*; and the appointment for the same object of a second commission, A.D. 435, in which were sixteen members, *illustres* or *spectabiles*. In both cases, at the head of these commissions, we find the name of Antiochus, a personage of consular and præfectorial dignity.¹ The principal object assigned by Theodosius for this undertaking was the astonishing paucity of persons familiar with the civil law (*tam pauci raroque extiterint, qui plena juris civilis scientia ditarentur*). After all their labours scarcely two were to be found who had anything like a perfect acquaintance with the law (*in tanto lucubrationum tristi pallore vix unus aut alter receperit soliditatem perfectæ doctrinæ*). This is a result which must be attributed to the immense accumulation of books (*copia immensa librorum*) and to the pile of imperial constitutions (*moles constitutionum divalium*), which involved the human mind in a maze of inextricable confusion (*quæ velut sub crassæ demersa caliginis et obscuritatis vallo, sui notitiam humanis ingeniis interclusit*).²

503. This work, which was completed after nine years' labour, received the imperial sanction, and was published in the East in the February of A.D. 438, under the name of the Theodosian Code, with the injunction that from the calends of January, A.D. 439, it was to be the sole source of imperial law (*jus principale*).³

¹ Cod. Theod. 1, 1, *De constitutionibus principum et edictis*. 5 Theod. and Valent. A.D. 429 and 6 Ibid. A.D. 435.

² *De Theodosiani codicis auctoritate*, const. Theod. and Valent. A.D. 438, princip. et § 1 in the introduction.

³ *De Theod. codicis auctoritate*,

§ 2: "Nulli post. Kal. Jan. concessa licentia, ad forum et quotidianas advocaciones jus principale deferre vel litis instrumenta componere, nisi ex his vide licet libris, qui in nostri nominis vocabulum transierunt et sacris habentur in scriniis."

Valentinian III., the Emperor of the West, also published it in the same year, and the discovery made by M. Clossius in our own time, together with other interesting documents, presents us with the verbal process employed for the reception of this code by the Roman senate, and the acclamations to which it gave rise: "*Augusti Augustorum, Maximi Augustorum*," eight times repeated; "God has given thee to us, may He preserve thee to us" (*Deus vos nobis dedit, Deus vos nobis servet*), repeated twenty-seven times; "Hope lives in thee, safety depends upon thee" (*Spes in vobis, salus in vobis*), repeated twenty-six times; "Dearer than our children, dearer than our fathers" (*Liberis cariores, parentibus cariores*), repeated sixteen times; "Honours spring from thee, patrimonies are derived from thee, all things flow from thee" (*Per vos honores, per vos patrimonia, per vos omnia*), repeated twenty-eight times. Such were the utterances of the Roman Senate under the Lower Empire! We sometimes hear similar sentiments uttered in the shape of after-dinner speeches and toasts at public banquets, but never in any other form or at any other time, and then their character is well understood and their value appreciated. But here we reckon fifty-one of these expressions, for in each case the number of times each expression was repeated is stated. Of these expressions or acclamations some were addressed to the high functionaries of the palace and others to the code itself, thus: "Let numerous copies be made at the public expense! Let the seal be impressed upon them, and let them be deposited in the public archives! Let them be circulated throughout the provinces! Let a copy be suspended in the office of every præfecture! Let it be forbidden to add notes!"¹ It is reported that Napoleon I., when he saw the first commentary upon the civil code, exclaimed, "My code is lost!"

504. The Theodosian code is divided into sixteen books, and each book into a number of titles, in which the matter is methodically distributed, and each constitution placed, accord-

¹ "*Gesta in Senatu urbis Romæ de recipiendo Codice Theodosiano*" (in the introduction to the Theodosian code).

ing to the subject of which it treats, in its chronological order. When a constitution embraces several subjects, its provisions are divided and placed under the respective heads to which they refer.¹ The second commission had received the power to make such alterations and modifications of the text in the constitutions as might appear desirable; the result is that we do not in all cases possess the true original text.²

The *jus civile privatum* occupies the first five books; certain additional provisions, however, respecting it, and of a very important character, are blended with other books (lib. viii., tits. 12 to 19 and lib. xi., tits. 30 to 39). It was arranged like the commentaries upon the edict; we already know that this was the traditional classification observed in jurisprudence, and this was the order followed by Hermogenianus in his abridgment of the law.³

In the following eleven books, with certain exceptions where there is some confusion, the law is dealt with in the following manner: lib. vi. treats of magistracies and other offices; lib. vii. of military matters; lib. viii. of inferior offices and certain accessory institutions; lib. ix. of criminal matters; lib. x. and xi. of fiscal matters and tribute; lib. xii. to xiv. of towns and corporations; lib. xv. of public works and games; lib. xvi. of ecclesiastical matters.

505. The first five books, dedicated to the *jus civile privatum*, are the most defective; but from the end of the sixth book till the last they are complete. Of the first five books all that we possessed consisted of some incomplete extracts quoted in the Breviarium Alaricum when M. Amédée Peyron discovered in the library of Turin, and M. Clossius discovered in the Ambrosian library of Milan, portions of the constitutions comprised in the first five books. M. Haenel at Leipzig in 1842, and M. Vesme at Turin in 1844, published complete editions of the Theodosian code, so far as these new discoveries permitted.

¹ Cod. Theod. 1, *De constitut. princip.*, 6, pr. Theod. and Valentin. A.D. 435: "Ac si qua earum in plura sit divisa capita, unumquodque eorum disjunctum a cæteris, apto subjiciatur titulo."

² Ibid. § 1: "Et demendi supervacanea verba, et adjiciendi necessaria, et mutandi ambigua, et emendandi incongrua tribuimus potestatem."

³ Vide § 465.

506. Were the three codes of which we have already spoken, the Gregorian, the Hermogenian, and the Theodosian, in our possession they would furnish us with a series of the most important imperial constitutions, from the reign, at least, of Septimius Severus to that of Theodosius and Valentinian. Unfortunately, however, we have but a few extracts from the two former. The Theodosian code forms one of the most important monuments extant concerning the history of the law, whether we consider the great number of the legislative enactments which it contains, or its application and influence upon the two divisions of the Roman world; an influence which, in the western empire, even survived its fall.

507. The Theodosian code was followed by new constitutions, designated by the general name of *novellæ*. Measures had been taken to prevent the unity of the imperial law (*jus principale*), which had been formerly established both in the East and West by the publication of this code, from being disturbed by subsequent constitutions. These *novellæ* were not to have the force of law till they had been published in one of the two empires, and transmitted to the other and there also published.¹ We have proof that these regulations were observed by Theodosius and his successor Marcian, probably also on his side by Valentinian; but this practice fell into disuse, and we are indebted to Haenel for the remark that the *novellæ* of the emperors of the East, but none of those of the emperors of the West, appeared in the code of Justinian; whence we conclude that the *novellæ* of the West had not been recognized in the East.²

¹ Cod. Theod. 1, 1, *De constit. princip.*, 5 (A.D. 429): "In futurum autem, si quid promulgari placuerit . . . etc." *De Theodosiani codicis auctoritate* (A.D. 438), § 5: "His adjicimus nullam constitutionem in posterum velut latam in partibus Occidentis, aliove in loco ab invictissimo principe, filio nostræ clementiæ, perpetuo augusto, Valentiniano posse proferri, vel vim legis aliquam obtinere, nisi hoc idem divina

pragmatica nostris mentionibus obtineatur, § 6. Quod observari necesse est in his etiam quæ per Orientem nobis auctoribus promulgantur."

² Editions of these *novellæ* have been published by Godefroy in 1566 as annexes to his Theodosian code; by J. Sirmond, Paris, in 1631; and by J. C. Amadutius, Rome, 1767; the most recent and complete being that by Haenel in 1844.

SECTION CI.

THEODOSIUS PROJECTS AN EXTENDED CODE.

508. The reign of Theodosius, whether it is to be ascribed to the tendency of the prince himself or to the influence of Antiochus, his prætorian præfect and the president of his law commissions, was characterized by the efforts made to elucidate, simplify and reduce the bulk of legal compilations, which had been accumulating through centuries, to a reasonable and manageable compass, and for the attempt to extract rules adapted to the conditions of the time.

The *lex de responsis pendentum* or *loi des citations* was the first step in this direction, so far as regarded the works and *responsa* of the jurists, but much remained to be done.

Three years later, A.D. 429, the constitution appeared directing the collection of the imperial constitutions, from the time of Constantine, upon the model of the Gregorian and Hermogenian codes. This same constitution reveals the project of the emperor and the end which he had in view.

509. The three codes, the Gregorian, the Hermogenian and the Theodosian, according to this first ordinance, were to form, in a certain sense, three historical codes, containing the series of imperial constitutions up to that time chronologically arranged, so as to preserve the record of these constitutions, showing at once by this arrangement, both in the order of the subject matter and in the chronological arrangement of each subject, what were the previous provisions which had been abrogated by subsequent enactments (*non solum reputatis consulibus et tempore quæsito imperii, sed ipsius etiam compositione operis, validiora esse quæ sunt posteriora monstrante*). But as it was more simple and more correct in practice to omit the portion which had been abrogated, or which had fallen into disuse, and only to cite that which remained in force (*sed cum simplicius justiusque sit, prætermittis eis quas posteriores infirmant, explicari solas quas valere conveniet*), the emperor announced a new code of a different description to the preceding, which was to be undertaken and published after the completion of his

first code (*qui, cum primum Codicem nostræ scientiæ et publicæ auctoritati obtulerint, aggredientur alium, donec dignus editione fuerit, pertractandum*).

510. This was to contain, arranged under each title, the extracts from the three preceding codes, and those from the treatises and *responsa* of the jurists in force (*ex his autem tribus Codicibus et per singulos titulos cohærentibus prudentium tractatibus et responsis*). "This would be," said the emperor, "another code for us, which would not admit of any error or ambiguity, and which, bearing our name, would show to all what should be followed and what avoided" (*noster erit alius, qui nullum errorem, nullas patietur ambages, qui, nostro nomine nuncupatus, sequenda omnibus vitandaque monstrabit*).¹ This last project was not carried into effect, and it was reserved till the reign of Justinian, when the idea, with certain modifications, was carried out.

SECTION CII.

FRAGMENTA VATICANA—MOSAICARUM ET ROMANARUM LEGUM COLLATIO—CONSULTATIO VETERIS CUJUSDAM JURIS- CONSULTI.

511. We must notice in this place three documents, or three classes of works upon Roman law, the precise date of which is uncertain, but which belonged to the period of the fourth and fifth centuries, in which we find an indication of a sort of revival of the study of law, at least so far as regards the compilation and quotation of texts. These works are consequently of much value. The first is anterior to the code of Theodosius, the date of the second is doubtful, and the third certainly belongs to a date subsequent to that of Theodosius.

512. M. A. Maï, a librarian of the Vatican, recognized in a manuscript of Cassian twenty-eight folios or leaves of palimpsests, the first of which consisted of a collection of fragments from

¹ Cod. Theod. 1, 1, *De constit. princip.*, 5, Theod. and Valent. A.D. 429.

the works of Roman jurists and from the imperial constitutions: he published the first edition at Rome in 1823 under the title of *Juris civilis antejustiniani reliquiæ ineditæ*; a publication which was reproduced at Paris in 1823 by the editors of the *Thémis*, and at Berlin in 1828 under the title of *Fragmenta Vaticana*; several other German and French editions have also appeared.¹

513. We see, by the numbering of the sections or parts that we possess, that those which have been discovered are neither the commencement nor the end of the collection, nor do they follow in a regular order, being separated, in the greater number of instances, by gaps more or less considerable, the extent of which we are able to determine by means of the missing numbers; it is also apparent that this collection was of a most extensive character. Calculating from the numbers of the sections in our possession, we conclude that they do not comprise a fifth of the whole. The collection was divided into sections or titles, each with its own rubric; seven of these titles, at least in part, are in our possession.² For the convenience of reference late editions are divided and numbered by paragraphs which do not belong to the manuscripts. The illegible passages, or those of which only a portion are legible, are numerous.

514. This collection, in which it is difficult to discover any general design, and, frequently, any logical connection, it is clear was not a complete work. It appears to be a mere collection of materials, intended either to be consulted at will by the collector, or to serve some purpose preparatory to some other composition. An attempt has been made to connect it with the final project of Theodosius, and it has been attributed to Hermogenianus, the author of the *Juris epitomæ*, on account of the almost complete identity that exists between one of its para-

¹ The best edition is that by Betmann Hollweg, *Ab incerto scriptore collecta fragmenta quæ dicuntur Vaticana*, Bonn, 1833, in 8vo., upon which the later editions have been founded.

² *Ex empto et vendito; De usu-*

fructu; De re uxoria et dotibus; De excusatione; Quando donator intelligatur revocasse voluntatem; De donationibus ad legem Cinciam; De cognitoribus et procuratoribus.

graphs and the fragment of this author cited by Justinian.¹ These are, however ingenious, mere conjectures.

515. The works of Roman jurists whose fragments we find quoted verbatim in this collection, with an indication of the author, are principally those of Paul, and less frequently those of Ulpian; Papinian is also quoted, but more rarely, and there is a single extract from Celsus, from Julian, and from Marcellus. The writings or the opinions of the ancient jurists Trebatius, Labeo, Cassius, Proculus, Sabinus, and of their successors, Celsus, Aristo, Neratius, Julian, Marcellus, Pomponius, and Scævola, are frequently quoted in the course of numerous paragraphs which have the appearance of notes. Amongst the imperial constitutions cited as extracts, the dates of which may be determined by the consulates, the most ancient is that of Marcus Aurelius, A.D. 163, and the most recent that of Valentinian I., A.D. 372. The collection is therefore posterior to this latter epoch. The Gregorian code is quoted five times, and the Hermogenian code once; but there is no trace either of the constitutions or the code of Theodosius, whence the probable conjecture that this collection is anterior to its publication.

516. The law thus collected in the texts or quotations from the ancient jurists is the pure classical law of the age of the jurists, which had been in many particulars abrogated at the time of the collection. The nature and indication of the sources whence the law is derived is of great service to us in the historical study of Roman law; and we have gathered from it some information concerning usufruct, dower, and especially the provisions of the *lex Cincia* relative to the regulations concerning donations, on which points we were previously without details.

517. The second work to be noticed is a comparison between the Mosaic and the Roman laws, made by an unknown author, and at a date which is also uncertain. It was discovered in the sixteenth century. Tillet found certain manuscripts, and

¹ *Fragmenta Vaticana, ex empto et vendito*, § 18; and *Dig. 19, 1, De actionibus empti et venditi*, 49, pr. fr. Hermogen.

believed that he was able to decipher on one of them the name of the author, "Rufinus." The first edition was published by P. Pithou, in Paris, in 1573.

518. This work is divided into several titles, with their rubrics, the first paragraph of each commencing with these words: "Moïses dicit." Title 16, which commences "Scriptura Divina sic dicit," is the sole exception. After this very very laconic indication of the Mosaic law follows a series of paragraphs consisting entirely of textual extracts upon the same subject, from the writings of the Roman jurists or from the imperial constitutions. The author does not add any comment, and the comparison which he wishes to establish in order to show the resemblance between the two systems of law is made solely by placing the texts in juxtaposition. The jurists who are quoted are the five designated by Adrian, but whether the compiler was guided by the *lex de responsis prudentum*, or whether he acted upon the usage which preceded that enactment, is doubtful. There are thirty-three extracts from Paul, twenty-two from Ulpian, eight from Papinian, two from Modestinus, one only from Gaius, eight from the Gregorian code, and five from the Hermogenian. It is uncertain how many belong to the Theodosian code.

There is a constitution of Theodosius I. quoted A.D. 390, from which we determine the fact that this compilation is posterior to that date. This constitution is preceded by the expression "*Item Theodosianus*," but grave doubts exist as to the accuracy of this rendering, whether in the original it was not *Item Theodosius*, and was transformed by the error of the copyist into *Theodosianus*.¹ No other quotation from the Theodosian code or from contemporaneous constitutions occurs.

¹ Grounds of doubt: 1st. The phrase *Item Theodosianus* is not followed by any mention of a book or title, whereas the author has in no case failed to indicate precisely the text, whether the Gregorian code, the Hermogenian code, or the works of the jurists. 2nd. The constitution in question is in fact found in the Theodosian code (lib. ix.

tit. 7, *Ad leg. Jul. de adult.*, const. 6), but it is without preamble or conclusion, whereas these exist in the *Collatio*; whence the conclusion that the compiler had derived the text not from the Theodosian code, but from archives, or some other document in which it was contained intact.

519. The objections raised serve as a basis from which we may form some conjecture as to the date of the *Collatio*. It is clearly posterior to the year A.D. 390. If we retain the name of Rufinus as that of its author, it cannot refer to the jurist Licinus Rufinus, the contemporary of Paul, but it may refer to one of two individuals,—either to Rufinus, the Gallo-Roman prætorian præfect and minister under Theodosius I., who was raised to this position on account of his erudition as a jurist, and to whom several of the rescripts of that prince are addressed; he died in the year A.D. 395: or it may refer to Rufinus, the fellow pupil of St. Jerome, the founder of the convent of the Mount of Olives at Jerusalem, the author of several theological works, which are received amongst those of the Fathers of the Church; he died in A.D. 410. Either of these dates, that is to say A.D. 395 or A.D. 410, may agree with that of A.D. 390, the date of the most recent of the quotations contained in the *Collatio*. The ecclesiastical character of the writings of Rufinus, one of the Fathers of the Church, has in our days determined Husckhe to regard him as the author of the Comparison between the Mosaic and the Roman laws. According to another conjecture of Haenel, the unknown author must have made his compilation after the constitution of A.D. 429, in which is found the first order for the preparation of the Theodosian code, and before the publication of it, that is to say, between A.D. 429 and A.D. 438. And, finally, Haubold, in his chronological tables, who has in this respect been followed by M. Blondeau, places the *Collatio* at a much later period, even after the fall of the western empire, at about the time that the collections of the Roman laws were made by the order of the barbarian kings.

520. From a phrase which appears at the head of a manuscript: “*Lex Dei quam Deus præcepit ad Moysen*,” and which certain critics regard as merely the commencement of the preface, this compilation has received the name of *Lex Dei*.

521. From the indication that we have given of the extracts which the *Collatio* contains, it is easy to see that it has been of great service in aiding the re-construction of the ancient works

upon the law which are therein quoted, particularly the *Sententiæ* of Paul, the *Regulæ* of Ulpian, the Gregorian and Hermogenian codes.

522. In 1577, Cujas, in the first volume of his works, from a manuscript of Ant. Oiselius which was in his possession, but which has since been lost, published a document which emanated from a jurist of the Lower Empire whose name he was unable to discover. He has placed this document under the title of *Consultatio veteris cujusdam jurisconsulti*, at the head of his *consultationes*, sixty in number, and has given it as an example of the *consultationes* of the period to which the jurist belonged.

523. In this aspect, it is a document of primary importance. The author addresses himself to some person who is supposed to consult him, and places the various legal points referred to him, with their solution, in regular order under chapters. Indeed, this jurist of the Lower Empire has very little of his own; his answer to each question consists of a series of quotations of texts, the source of which he indicates with precision. This is an application of the *lex de responsis prudentum*, and a specimen of the character and method which the practice of the law had at that time acquired.

524. The application of the *lex de responsis* is limited, because the quotations are confined to the elementary work of the *Sententiæ* of Paul and to the three codes—the Gregorian, the Hermogenian and the Theodosian. We find twenty-one extracts from the *Sententiæ* of Paul, sixteen from the Gregorian, twenty from the Hermogenian, and eight from the Theodosian codes. But the great utility of this publication consists in the fact that it facilitates the interpretation of the texts.

525. The “jurist of the Lower Empire” qualifies as *leges* the *Sententiæ Pauli*, which he quotes, and in cap. vii. assigns the following reasons: “*cujus Sententias sacratissimorum principum scita semper valituras ac divalis constitutio declarat.*”

This evidently refers to the constitution of Constantine, A.D. 327, and to the *lex de responsis prudentum*, A.D. 426.¹ The extracts from the Theodosian code contained in his work place it beyond doubt that he wrote subsequently to the publication of that code, but nothing more can be said as to the date of his work.

EMPERORS.

Western Empire.	Eastern Empire.
A.D. 450. VALENTINIAN 3RD.	A.D. 450. MARCIANUS.
„ 455. PETRONIUS MAXIMUS.	
„ „ AVITUS.	
„ 456. The throne vacant.	
„ 457. MAJORIANUS.	„ 457. LEO 1st.
„ 461. LIBYUS SEVERUS.	
„ 465. Interregnum (two years).	
„ 467. ANTHEMIUS.	
„ 472. OLYBRIUS.	
„ 473. GLYCERIUS.	
„ 474. JULIUS NEPOS.	„ 474. LEO 2nd.
	„ „ ZENO ISAUROS.
„ 475. ROMULUS AUGUSTULUS.	

SECTION CIII.

THE END OF THE WESTERN EMPIRE.

526. We have now arrived at the end of the list of the emperors of the West. Their empire had been broken up by the barbarians and parcelled out among the invaders. Nothing could be more dramatic than the picture of the events which terminated in this catastrophe.

Up to the reign of Valens, the barbarians, who flocked to the plunder of the provinces and retired with their booty, were more

¹ See §§ 457 and 459.

frequently the conquered than the conquerors. Numbers of them had been enlisted by this emperor and had formed independent corps which fought side by side with the Romans, taking part in the wars between the princes and attaching themselves to their respective interests. They had thus, without losing their native hardihood and power of endurance, learnt the art of war; they also became acquainted with the decay of Roman power and with the resources of the interior of the empire. Under Valens an Asiatic race, before unknown, called the Huns, appeared in great force along the Danube; they pressed upon the Alani, the Alani pressed upon the Goths, and the Goths threw themselves into the empire. And while the Huns established themselves in the place of the hordes whom they had either destroyed or dislodged, the Goths demanded a settlement in the Empire. They were received; but, deprived of their women and children, who were taken from them as hostages, made the victims of the rapacity of the imperial officers, distressed for want of food, yet retaining their arms, they yielded to the pressure of necessity, ravaged the country, destroyed Valens, and forced tribute from the Romans; an ignominy, however, with which the Roman emperors were not altogether unacquainted. We find these barbarian chiefs, in their wooden huts or under tents made of the skins of wild beasts, surrounded by savage hordes, receiving with insolence ambassadors clothed in purple and counting out the gold sent to them by the masters of Rome and Constantinople. But the time came when gold no longer satisfied them; they established themselves and settled in the countries with the plunder of which they had heretofore been contented. Alaric and Radagaisus under Honorius, Attila and Genseric under Theodosius, dispersed their soldiers through the length and breadth of the empire and commenced its dismemberment.

Alaric headed the Goths, to whom the ordinary tribute had been refused, and, being joined by the Huns, the Alani and the Sarmatians, ravaged Thrace, and passing Constantinople precipitated himself upon the West, A.D. 403. Being defeated by Stilico, he was bribed to withdraw, but being again defeated during his retreat, he retired, meditating revenge, A.D. 406.

Radagaisus, with the Suevi, the Vandals, the Burgundians, the Germans, the Alani and the Sarmatians, who followed him, penetrated Italy, A.D. 406. Stilico dispersed this army likewise, and destroyed its chief: but though vanquished the barbarians were no less dangerous than before, for they had entered Italy never to leave it.

Alaric reappeared; by heaping upon him untold treasures the Romans induced him to retire, but he again reappeared in order to proclaim an emperor of the West, who, as a reward, styled him master-general of the empire. Upon his third appearance he battered down the gates of Rome, and let loose his devastating hordes upon the venerable city, A.D. 410. Death stayed the hand of the victor in the midst of his triumphs, and the Gothic leader, by whom Alaric was succeeded, received the sister of an emperor as his wife, and invested with the title of Roman general took the command in Gaul.

The Franks, the Burgundians and the Visigoths divided the country between them, the Franks occupying the provinces in the north, situated near the Loire and the Seine; the Burgundians, in A.D. 414, the eastern provinces; the Visigoths, A.D. 419, the southern parts. Thus were founded three kingdoms, in which the Romans and the ancient inhabitants of the country were mingled with the conquering races, but only allowed to enjoy an inferior position.¹

527. Alaric and Radagaisus were soon replaced by Attila and Genseric.

Attila, the king of the Huns, who ravaged the provinces of the East, and pitched his tents under the walls of Constantinople, consented for a large sum of money to quit that spot for the West, A.D. 450. He first threw himself upon the Gauls, but the Saxons, the Franks, the Burgundians, the Visigoths, and the different races who were established in those territories, immediately arose to defend their prey. Attila, defeated near Chalons, changed his course, and fell upon Italy. He then marched towards Rome, pillaging the country as he proceeded,

¹ The student of this interesting portion of history is referred to Lehuéron's

Histoire des institutions Mérovingiennes, Paris, 1842.

and massacring the inhabitants. He demanded as his wife Honoria, the sister of Valentinian III., who, almost a captive at the court of Constantinople, had conceived the idea of having recourse to the barbarian. The intercession of Pope Leo I., and the conditions offered to Attila, arrested his progress, and Rome was for the moment saved. The chief of the Huns, however, soon made preparations for a second invasion, and declared his determination of getting possession of Honoria, who had been kept from him, when he was struck with sudden death, A.D. 453.

Genseric, the king of the Vandals, who had snatched from the Roman empire first Spain and afterwards nearly all the provinces of Africa, was the enemy who was destined to inflict the most terrible blow upon Rome. In A.D. 455 he appeared under the walls of the city; it surrendered at discretion, and was sacked during a period of forty days by the barbarians, so that what had been left by the Goths had only been reserved for the Vandals. Genseric departed with his vessels laden with plundered treasures, leaving behind him a heap of ruins and ashes, a vacant throne and an empire almost overturned.

528. This empire, after the sacking of Rome, languished for about twenty years. Emperor succeeded emperor; the barbarian Ricimer, under the title of general, made and unmade them at his pleasure, and sacked Rome a third time to place Olybrius on its throne. He was succeeded by Gondobald, a Burgundian chief, who, in his turn, made Glycerius emperor. Finally, a third barbarian, Orestes, one of the ambassadors of Attila, caused his son Romulus Augustulus to be proclaimed emperor. Then the Huns, the Suevi, the Heruli, and all the tribes that followed his standard and who constituted a large part of the army, claimed their share of the spoils of the West, and tumultuously demanded that Italy should be divided amongst them. Orestes refused; Odoacer collected about him the malcontents, assassinated Orestes, compelled Augustulus to resign his purple, and declared himself king of all Italy, which country he partitioned out amongst his soldiers.

Thus fell to pieces the remains of the western empire, while

the throne of the Byzantine emperors remained secure amid all the shocks from barbarian invasions, its preservation being due to the continuous flow of the invading races towards the west.

Odoacer did not retain the throne long, for he was driven from it by Theodoric, who, at the head of the Ostrogoths, wrested the sceptre from his hand.



SECTION CIV.

ROMAN LAWS PUBLISHED BY GERMAN KINGS.

529. But while all those new races were thus establishing themselves in Gaul, Spain, Africa, and Italy, what became of Roman law? The barbarians, who brought with them their own manners and national customs, had a certain respect for, and even some acquaintance with, the laws of the empire; and when they settled down with the now-conquered Romans, dividing with them their lands and goods, they adopted the principle of the personality of law. Every man was judged by the laws of the nationality to which he belonged, or, even in certain cases, pretended to belong. Thus there were on the one hand the different Germanic laws drawn out and promulgated in the new kingdoms, and on the other collections of Roman laws composed by order and with the sanction of the German kings. Such were, in Gaul, the Roman law of the Visigoths (*lex Romana Visigothorum*), called also, since the sixteenth century, the Breviary (abridgment, abridged collection) of Alaric, and sometimes the *Breviarium Alaricianum* or *Aniani*; and the Roman law of the Burgundians (*lex Romana Burgundiorum*), designated also in the sixteenth century by the names of *Papiani responsa*, or simply the *Papian* law. In Italy, among the Ostrogoths, there was the edict of Theodoric (*edictum Theodorici*).

530. It is to be remarked that it was with the consent of the emperors of Constantinople, who, amid the convulsions that attended the disruption of the Empire, did not scruple, with the hope of creating a diversion in favour of the empire of the

East, to join the barbarians, that those three nations laid the first foundation of their kingdoms in the West. The Visigoths, in consequence of a treaty with Honorius, established themselves between the Loire and the Pyrenees, taking Toulouse for their capital; the Burgundians, in consequence of a treaty with the same emperor, in the country watered by the Saone and the Rhone, extending to the Durance, taking for their capital Geneva; the Ostrogoths, eighty years later, directed by the Emperor Zeno to Italy, achieved in four years, against the barbarians who had preceded them there, the conquest of the Peninsula, and, taking Ravenna for the capital of their kingdom, were recognized by Anastasius. Ataulf, king of the Visigoths, with whom Honorius had treated, married a short time afterwards (A.D. 414) Placidia, sister of that emperor, and daughter of Theodosius the Great. Theodoric, king of the Ostrogoths, had been brought up as a hostage in the court of Constantinople, and it was through the delegation of the rights of the Emperor Zeno that he had advanced into Italy against Odoacer and his Heruli. He aimed at nothing less than reconstructing by his own hands the empire of the West. He had coin struck with two effigies, one side bearing that of the emperor of the East, the other his own. All these facts must be borne in mind if we would properly understand how the Roman law preserved its influence and was received as an inheritance, at least for the Roman populations, by the German chiefs, in the new states which they formed.

It must be noted that the date of the foundation of the two kingdoms, the Visigoth and Burgundian, in Gaul, in the years 412-413 respectively, is anterior, by more than twenty years, to the publication of the Theodosian code, A.D. 438; and that consequently it was not in the form of a system of laws promulgated by the reigning power, but only as a code regulating and supplementing the law followed by the Roman population, under the superior influence of the Roman law and of the supremacy of the emperors of the East, that this code, and subsequently the *Novellæ*, penetrated into these two kingdoms. They received their local legislative character by the promulgation in the beginning of the sixth century of the *lex Romana*. On the

other hand, the date of the establishment of the kingdom of the Ostrogoths in Italy, A.D. 493, is subsequent, by fifty-five years, to the publication of the Theodosian code.

531. 1.° The history of the formation of the Roman law of the Visigoths is to be found in the *Commonitorium* or notice placed at the head of the copy addressed to each count, requiring him to enforce it. The one which we possess is entitled "*Alarici regis exemplar auctoritatis*," and is addressed to a Count Timotheus, *vir spectabilis*; edited, subscribed and certified (*edidi, atque subscripsi: Recognovimus*), in execution of the orders of the king, by Anianus, *vir spectabilis* also, secretary or *referendarius*, if we are to judge by the mission he executed, of the chancery of the kingdom.

We see in it that this collection (*hoc corpus*) was prepared, in conformity with written orders (*sicut præceptum est*), under the direction of Gojaric (*ordinante Gojarico*), count of the palace, *vir illustris* (in those kingdoms the rank of the Roman nobility was preserved in the person of the Barbarians), probably by a commission composed for the greater part, if not entirely, of Roman jurists, and that it was decreed at Aire in Gascony, in the twenty-second year of the reign of Alaric II., consequently in A.D. 506.

The king declares in the *Commonitorium*, or notice, that, for the benefit of his people, with the help of the Deity, he wishes to correct what appears unjust in the laws, to remodel them, and to do away with the obscurity of the Roman laws and ancient rights (*omnis legum Romanarum et antiqui juris obscuritas*), so that there may be nothing ambiguous in them: everything being made plain (*omnibus enucleatis*), and the extracts chosen from the works of the ancient jurists collected into a single volume. It is an echo of what had already been said seventy years before by Theodosius, in the preparatory constitution of his code, and a prelude to what was to be said with more emphasis and more prolixity, and which was to be executed with more amplitude, by Justinian more than thirty years afterwards.

This collection is not published by the sole authority of the

Visigoth king, as were those of the Lower Empire; it was submitted, according to some ancient custom of the people, to the assent of the ecclesiastics and of the principal nobles (*adhibitis sacerdotibus et nobilibus*), and in the provinces to that of the bishops and of the provincials chosen for that purpose (*venerabilium episcoporum vel electorum provincialium nostrorum roboravit adsensus*).

The king ordains that the original collection shall be entrusted to the Count Gojaric, and that no copy shall be officially received or have any authority except such as shall have been subscribed by Anianus (*vir spectabilis*) with his own hand.

No one is to be permitted to quote, in litigation, any law or work of any jurist (*aut de legibus, aut de jure*), except what is contained in the collection thus subscribed and certified. An order is given to the count, to whom the *Commonitorium* is addressed, to see to this in his jurisdiction; he is answerable for it with his head (*ad periculum capitis tui*), or at the peril of his property.

If we pass from the form to the contents, we shall find them indicated by this general formula: *In hoc corpore continentur leges sive species juris de Theodosiano et diversis libris electæ*.

This antithesis between the *leges*, meaning here the constitutions, and *jus*, that is to say, the works of the jurists, occurs several times, with a few changes of expression, either in the *Commonitorium* or in the body itself of the document;¹ and it is summed up there in its shortest form: "*aut de legibus aut de jure*"—" *jure et legibus continetur*,"² in which the word *jus*, by the force of habit, had assumed a sense, already given to it, it is true, by Pomponius,³ but which had now become its technical signification, viz., the "law of the jurists."

These two sources of law are arranged as follows in the collection of Alaric:—1st, *Leges*:—The Theodosian Code, con-

¹ *Commonitorium*, passim: "Legum Romanarum et antiqui juris obscuritas." "Nulla alia lex neque juris formula." "De Theodosiani legibus, atque sententiis juris vel diversis libris electæ."

² See § 236.

³ In the *Commonitorium*, and in the

body of the document: *Interpretation of the law of the Theodosian Code* (iii. 13, *De dotibus*): "Quia hoc lex ista non evidenter ostendit, in jure, hoc est in Pauli Sententiis, sub titulo *De dotibus* requirendum." *Interpretation of the law of the Gregorian Code* (ii. 2, 1).

sisting of extracts from the sixteen books, and a series of the *Novellæ* of Theodosius and of his successors down to Severus. 2nd, *Jus* :—An abridgment of the Institutes of Gaius, in which the whole of the fourth book, treating of actions, and several parts of the other books, have been omitted, as being obsolete; the *Sententiæ* of Paul (five books); the Gregorian Code (thirteen articles); the Hermogenian Code (two articles); and, lastly, a single fragment in two lines, of the first book of the *responsa Papiniani*, which gave rise to the belief that perhaps the continuation was lost. A passage in this collection, following the *lex de responsis prudentum*, which is recited, after pointing out who the jurists were who were accredited by that law, explains that it is with a view only to the necessities of the present time that the compilers have confined themselves to selecting extracts from Gaius, Papinian and Paul, adding to them Gregorian and Hermogenian,¹ whose codes are placed here among the works of the jurists, because they were, in effect, private and not imperial publications.

The texts inserted in our collection, with the exception of Gaius's epitome, are accompanied by an *Interpretatio*, in the Latin of the time, which is useful as showing the condition of the institutions of the epoch, and indicating the manner in which the Roman law, as published by Alaric, had been modified and applied. This *Interpretatio* is still to be found in our editions of the Theodosian Code. The expressions *elegimus*, *inseruimus*,² which we meet with there, show that it is the work of the compilers themselves.

This code is frequently quoted in the middle ages, under the title of *lex Theodosiana*, *Corpus Theodosianum*, *Liber legum*, *Ilex Romana*. The name *Breviarium Alarici* appears in the books only of the sixteenth century, but it has a flavour of age about it and of more ancient usage. As to the *Breviarium Aniani*, the secondary part which Anian plays has not been fully realized.

¹ *Interpretation* of the Cod. Theod. 1, 4, *De respons. prudent.*: "Sed ex his omnibus juris consultoribus, ex Gregoriano, Hermogeniano, Gaio, Papiniano, et Paulo, quæ necessaria causis

præsentium temporum videbantur *elegimus*."

² See the preceding note, together with the *Interpretation* of lex 7, Cod. Theod. 5, 1, *De legit. hered.*

Alaric II. did not long survive his work ; less than one year afterwards, A.D. 507, he perished in the battle of Vouillé, killed by Clovis's own hand, and the Franks replaced the Visigoths in almost all their possessions in Gaul ; but the legislative work of Alaric survived these disasters ; and of all the collections of Roman laws made by the barbarian princes, it was this whose authority spread the farthest and lasted the longest.¹ The Visigoths spreading from Gaul to Spain (A.D. 415), under their kings Theodoric II. and Euric (from A.D. 453 to A.D. 484), conquered the whole of that country, and there published, a century and a half after the Breviary of Alaric, a code of laws for the Visigoths (*codex legis Visigothorum*), which we must not confound with their Roman law.

531. 2.º The *Lex Romana* of the Burgundians had been preceded, among that people, by the publication of the Germanic law, which is called the *Lex Gundobada*, from the name of their king Gundobald. The second preface of that law, under king Sigismund, son of the preceding (A.D. 517), in ordaining that Romans should have Roman law administered to them, announces a special code of that law.² This is in our possession ; it is subsequent to the A.D. 517, and is divided into forty-seven articles. M. Savigny has shown, by the mere comparison of the headings, that the arrangement is the same as that of the *lex Gundobada*. This code is formed in great part of texts taken from the Breviary of Alaric ; there are also a few from direct Roman sources, the whole being very brief. The name of *Responsa Papiani*, or the Papian law, is taken from the first edition by Cujas, in 1566, who mistook *Papianus*, a contraction of Papinianus, sometimes used by ancient copyists, for the name of an unknown jurist, the author of the collection. It is apparent at once, from the first page of this edition of 1566, how this mistake took place ; the fragment,

¹ The edition recommended is that of Haenel, Leipzig, 1849, for which the learned editor has consulted seventy-six manuscripts and seven ancient abridgments of the Breviary, five of which are manuscripts ; this edition is enriched with notes and appendices.

² *Prologue, 2nd preface*: " Inter Romanos . . . Romanis legibus præcipimus judicari : qui formam et expositionem legum conscriptam, qualiter judicent, se noverint accepturos, ut per ignorantiam se nullus excuset."

in two lines, of the *responsa Papiniani*, which concludes the Breviary of Alaric, is immediately followed, in the manuscript of Cujas, by the Roman law of the Burgundians, in such a manner as to induce the reader to believe that it formed its heading and title. Cujas recognized and rectified the error in the edition of 1586; but the name of Papian has remained. This Roman law did not survive the fall of the kingdom: this happened less than seventeen years afterwards (A.D. 534), and the kingdom of the Burgundians was absorbed by the Franks. After the fall it yielded to the authority of the Breviary of Alaric, which was very superior to it, or to that of the text itself of the Theodosian code, promulgated, at its origin, in the countries occupied by the Franks.¹

531. 3.^o The edict published by Theodoric, who aspired to maintain the empire of the West, and to Romanize his people, was drawn up by Cassiodorus and Boetius, two men learned in Roman literature, and was an edict at once for the Goths and for the Romans.² The Roman sources had been blended and accommodated to the proposed end; but the edict scarcely touched upon private law. The date generally attributed to this edict, even by Savigny, is A.D. 500; but the opinion of M. Gloeden (1843) has now obtained favour, that the date of this edict should be placed after the year 506. The conquests of Justinian, and the publication of his code of laws in Italy (A.D. 554), put an end to the kingdom of the Ostrogoths, and to the edict of Theodoric.³

532. Historians look at the laws we have been alluding to in the light they throw upon the fate of populations and the course of events. Students of Roman law value them for the services they have rendered us (the *Breviarium* especially), in

¹ The first edition is that of Cujas, Lyons, 1566, in folio, at the end of his Theodosian Code. Modern edition by Aug. Fred. Barkow, *Lex Romana Burgundiana*, Eryphiswaldiæ, 1826.

² Ed. of Theodoric, *Prologue*: "Quæ Barbari Romanique sequi debeant." *Epilogue*: "Quæ omnium Barbarorum

sive Romanorum debet servare devotio."

³ It is Pithou who gave the first edition of the Edict of Theodoric, in continuation of the works of Cassiodorus, Paris, 1579, in folio. Modern edition by G. F. Rhon, *Commentatio ad Edictum Theodorici, regis Ostrogothorum*, Halæ, 1816.

transmitting various texts which, without them, would have been lost.

532a. In the meanwhile (A.D. 469) Anastasius had succeeded to Zeno in the empire of Byzantium. Justin succeeded to Anastasius, A.D. 518. The issue of a barbarian shepherd, he came from the wilds of Bulgaria to ascend the throne. His nephew, Justinian, was brought up with care in the midst of the court, received the title of Augustus, was associated with him in the administration of the empire (A.D. 527), and on the death of his uncle, a few months afterwards, he succeeded to the throne of the Eastern Empire.

III.—JUSTINIAN EMPEROR, A.D. 527.¹

533. The invasion of the barbarians in the south ended in the possession of Africa and Spain by the Vandals and Visigoths; of Gaul by the Franks, the Burgundians, and the Visigoths; Italy by the Ostrogoths; and the other parts of the West by other hordes of barbarians. The empire of Constantinople subsisted alone; it still preserved the title Roman, which it should have lost with Rome to assume that of Greek. On its Asiatic limits were, among other enemies, the Persians, who had profited by the fall of one empire and the troubles of another, and had become formidable. It was under these circumstances that Justinian ascended the throne. The victories of a young Thracian, Belisarius, appearing for the first time at the head of an army, soon procured him an honourable treaty with the Persians; and then a peace of a few years permitted Justinian to give his attention to the internal condition of his dominions.

The only relics of the old Roman manners and character now remaining in the East were a few names, a few reminiscences, and many vices; Greek was the language generally spoken, Latin was almost obsolete as regards common use. Men's minds were occupied with theological disputes and divided between orthodox and heretical doctrine, Eutycheans, Arians, and others; or

¹ For more ample biographical details, see article *Justinian*, vol. ii., M.

Ortolan's *Explication Historique des Instituts*.

else with contests in the circus, where the colours worn by the charioteers divided the population into factions,—the whites, the reds, the blues, and the greens; these divisions, at first created for a frivolous cause, became gradually transformed into political factions, animated with all the ardour and the enmity of party spirit.

We shall not pause to examine the conduct of Justinian in reference to these matters, and we shall pass over with silence his persecutions against all who were not orthodox Christians; the massacre which he ordered of all the Samaritan Jews who had revolted in Palestine; the ardour with which he embraced the party of the blues against the greens; the mischief which that partizanship, on more than one occasion, brought about, resulting as it did in a sedition of the greens, to which he nearly fell a victim. This commenced in the exasperation of the greens, supported by the discontent of the people, against the exactions of John, prætorian præfect, and Tribonian, then quæstor; and was aimed at nothing less than replacing on the throne the family of Anastasius, the last emperor but one. It is principally Justinian's character as a legislator with which we have to deal.

534. Since the time of Alexander Severus, when the series of illustrious men who had by their works thrown so much light upon the study of jurisprudence was interrupted, no great jurist had appeared. The study of law had not indeed been entirely abandoned, but it had only produced men of ordinary intellectual calibre,—men who merely followed the writings left by the jurists, and the constitutions promulgated by the emperors. They could do nothing more than quote the authorities, or at the very outside string together extracts. Most of them conducted cases before the magistrate (*advocati, togati*); some gave lessons in law (*antecessores*) in the public schools, of which there were two in the East, one at Constantinople and one at Berytus, a town in Syria; those who acquired reputation or fortune filled high offices of the empire, or exercised the functions of magistrates or of judges. The most learned, of whom there happened to be a few, as was shown in the reigns of Theodosius II. and of Justinian, were

those who were most versed in retrospective studies of a former age, and in the bibliographical knowledge of ancient texts; they were in some sort, to use the expression of a poet, but the larvæ and the spectres of the ancient jurists. We know of no writers who in this age of the decline of legal knowledge published any original works on law, except Aurelius Arcadius Charisius, *magister libellorum*, who wrote three books,—one on the office of the prætorian præfect, one on civil offices, and another on witnesses, a few fragments of which have been quoted in the Digest of Justinian.¹ In addition to this writer, Hermogenian was the author of an epitome or abridgment of the law which is frequently quoted.

535. If science had thus sunk into decay, it must be confessed that the laws as they multiplied had become very obscure. The *plebiscita* of ancient Rome, the *senatûs-consulta*, the edicts of the prætors, the numerous books of the authorized jurists, the codes of Gregorian, of Hermogenian, of Theodosius, the constitutions of all the emperors who had come after him, texts accumulated, confused and contradictory, formed altogether a real legislative chaos. Theodosius II. had already described the writings of the jurists as an *immensa copia*, and the mountains of imperial constitutions had done nothing but increase since that time.

536. As to practice, as far as the works of the jurists are concerned, everything was determined by the *lex de responsis prudentum*; and as regards the imperial constitutions, the text books were the Gregorian, Hermogenian and Theodosian codes, to which must be added the numerous *Novellæ* which had followed.

The *lex de responsis* had not much diminished the evil. It was always an embarrassment, and, besides, it lowered the dignity of jurisprudence; it was a temporary and at the same time a poor expedient. We know that Theodosius intended to settle it definitely, but he never carried out the project; so the

¹ Dig. 1, 11, *De officio præf. præt.*, 1; 22, 5, *De testibus*, 21; 50, 4, *De muneribus*, 18.

expedient, with its difficulties ever increasing, lasted out a hundred years.

The three codes of constitutions also, with all the subsequent enactments superadded, owing to the changes that had come over the spirit of the age, and the peculiar wants of the time, loudly called for revision.

537. It will be remarked in all the histories of nations, how at certain epochs men with extensive views, who have become members of the government, have been seized with the idea of introducing clearness, uniformity and unity into legislation and jurisprudence. Julius Cæsar had conceived some idea of this kind with regard to the laws and the works on jurisprudence in the time of the republic, which he found to be very voluminous and wanting uniformity. But what must it have been after five centuries of the empire? The project of Theodosius II. progressed no further than the stage of partial and preliminary preparation. And it was left to Justinian to carry it out, which he did under another form. The practical code projected by Theodosius was intended to contain an amalgamated and arranged compilation of the imperial enactments and the decisions of the jurists which should be considered fit to be retained in force, to form thenceforth the only code binding on all. There would thus have been a single code, which would have fused the divers elements that had entered into the historical composition of Roman law. The legislative works of Justinian have kept up a line of demarcation between these elements,—the constitutions of the princes and the works of the jurists,—in which, in the shape of exposition, or commentary, or analysis, the *leges*, the *plebiscita*, the *senatûs-consulta*, the *edicta* of the magistrates and the other legal forms are to be found.

The work of Justinian has, therefore, less of the principle of unity than the project of Theodosius, but it served better both as a monument of ancient law and as a code adapted for practical purposes. The division of the work was easier, and it required less power of conception. As historians we may congratulate ourselves that the double form was preserved.

538. Justinian having succeeded his uncle, A.D. 527, issued in the very next year his constitution directing the construction of a new code. At that time, A.D. 528, the code of Theodosius was only ninety years old. His other legislative works followed each other successively, and in the space of six years the whole was finished. We shall let the emperor tell us the objects for which, and the method in which, each part of the code was composed. The following, if not a translation, is at least an analysis of his preliminary constitution.



SECTION CV.

CODEX JUSTINIANEUS—CODEX VETUS.

539. The word “code,” in other than its general signification, had been applied technically, in the publications of Gregorian, Hermogenian and Theodosius, to designate a collection of imperial constitutions. Theodosius indeed entertained the project of using it in a more general sense, but his project having come to nothing, the more limited and technical signification had remained; this was, however, no obstacle to its being still very often used in its general sense. The first body of laws which Justinian promulgated was a collection of this sort.

“ To the Senate of Constantinople.

“ To diminish the length of lawsuits and to do away with the confused mass of constitutions contained in the Gregorian, Hermogenian and Theodosian codes, published by Theodosius, by his successors and by ourselves, we wish to put them altogether in a single code, under our own auspicious name.” (Theodosius had merely said, “*nostro nomine nuncupatus*; with Justinian it is, “*sub felici*,” and later, “*divino nostri nominis vocabulo*.”)

“ Efficiently to perform so great a work, we choose . . . (Here follow the names of ten personages whom Justinian distinguishes respectively with one of these epithets: *Excellentissimus*, *Eminentissimus*, *Magnificus*, *Disertissimus*, &c. At their head can be remarked John, ex-quæstor of the sacred

palace, ex-consul and patrician; among them Tribonian or Tribunian, who was soon to assume the first place, and Theophilus, count of the consistory, professor of law at Constantinople).

"We permit them, suppressing preambles, repetitions, contradictory or disused clauses, to collect and classify the laws under proper titles, adding, cutting down, modifying, compressing, if need be, several constitutions into a single enactment, so as to render the sense more clear, and yet preserve in each title the chronological order, so that this order may be noted by position in the code as well as by date." Ides of February (13 Feb.), A.D. 528.¹

The work was entrusted to six jurists and was divided into twelve books. The code was concluded in the space of one year, was published on the 7th of the ides of April (7th April), A.D. 529, and came into force from the 16th of the kalends of May of the same year: "We forbid all pleaders and advocates to quote, under the penalty of making themselves guilty of fraud, any other constitutions than those which are inserted in our code, or to quote otherwise than as is written there: for these constitutions, together with the works of the ancient interpreters of the law, must suffice to decide all suits. No difficulty must be raised on account of some of them being without date, or of their having been originally only private rescripts."²

SECTION CVI.

QUINQUAGINTA DECISIONES.

540. After the work on the imperial constitutions and the publication of the code which contained them in their new form,

¹ *De novo Codice faciēdo* (first constitution at the head of the code).

² *De Justiniano Codice confirmando* (second constitution at the head of the code). What is said about constitutions without date is in allusion to a rule which is found in the Theodosian code (lib. i. tit. 1, const. 1), to the effect that such constitutions are devoid of authority. This provision will be in-

applicable to the constitutions inserted in the code of Justinian, because the latter will all have for the future, as a legislative date, the date of that code. Justinian, in declaring that he abrogates all the anterior constitutions not inserted in his code, reserves those connected with certain particular or official interests, which he designates.

the legislative activity of Justinian was brought to bear on ancient law (*Postea vero cum vetus jus considerandum recepimus, &c.*), that is to say, on the writings of the jurists which then represented all ancient law. The first thing to be considered was the existence of numerous points on which there was divergence of opinion and contradiction between the jurists, which were the cause of much embarrassment and uncertainty to pleaders and judges. Instead of the mechanical, and to the last degree embarrassing, *lex de responsis prudentum*, Tribonian suggested to the emperor (*suggerente nobis Triboniano*) a scheme more worthy of a legislator: it was to make a series of constitutions, in which each of these controverted points should be successively dealt with and definitively settled, so as to put an end to perpetual altercations (*antiqui juris altercationes placavimus*). These Decisions were published at intervals before the Digest and the Institutes, the greatest number in A.D. 529 and in A.D. 530, amounting in all to fifty (*quinquaginta Decisiones fecimus*). About the same time a great number of other constitutions were promulgated (*alias plurimas Constitutiones promulgavimus*), which were distinct from the *Decisiones*, because they were not specially intended, as the latter were, to put an end to ancient controversies; but to establish a new rule in the place of the antiquated institutions which they abrogated.

541. The fifty Decisions have not reached us in their entirety; they are mentioned in various passages of the work of Justinian,¹ and it is thus that their existence became known to us. It is probable that they formed, either by themselves alone, or in conjunction with the other contemporary constitutions of which we have just spoken, a collection which was rendered useless by the publication of the Digest, of the Institutes, and especially that of the second edition of Justinian's

¹ Instit. 1, 5, *De libertis*, § 3: "Et dediticios quidem per Constitutionem nostram expulimus, quam promulgavimus inter nostras decisiones: per quas, suggerente nobis Triboniano, viro excelso, quæstore nostro, antiqui juris

altercationes placavimus." 4, 1, *De oblig. quæ ex delicto nasc.*, § 76: "Sed nostra providentia etiam hoc in nostris decisionibus emendavit." Constitution iii., *De emendatione Codicis*, §§ 1 and 5; Cod. 6, 51, *De caducis tollendis*, § 10.

Code. M. de Savigny, in his "History of Roman Law in the Middle Ages," mentions an ancient gloss of the Institutes, anterior to the school of Bologna, which is designated by the qualification of "the Turin Gloss," because the manuscript of it exists in the royal library of Turin, from which it is clear that the fifty Decisions must have formed a collection by themselves, known to the writer of the gloss, and divided at least into fifty books, since that gloss cites a fragment of it as forming a part of the fiftieth book of the constitutions (*sicut libro L. constitutionum invenies*).¹

This reference has not the word *Decisionum*, but *Constitutionum*, and consequently does not decide whether it is a separate collection of the Decisions alone; but it may be inferred that it is so, from the nature and the scope of those Decisions being quite special, and from the number (fifty) agreeing with that of the book of the collection, as also from the expressions used by Justinian: "*Per constitutionem nostram quam promulgavimus inter nostras Decisiones*,"² and elsewhere, "*Secundum quod in divini nostri nominis Decisionibus statutum est*."³

542. If the collection of the fifty Decisions have not reached us, there is not the least doubt but that the provisions, independently of the influence which they have exercised on the composition of the Digest and of the Institutes, have passed for the greatest part into the second edition of the Code, as well as those of the contemporary constitutions. It is there that we can partially find them with the indication of their date; and if a specimen is desired of the course pursued in those Decisions, it can be found in the constitutions, which we cite in a note, the date of which is of A.D. 530, and which indubitably formed a part of the fifty Decisions.⁴

¹ De Savigny, *History of Roman Law in the Middle Ages*, ch. 12, § 71, and 3rd appendix, No. 241, in which the whole text of that gloss is reported; vol. ii. p. 122, and vol. iv. p. 381, of the French translation.

² Inst. 1, 5, *De libertis*, § 3, cited in the preceding note.

³ Cod. 6, 51, *De caducis tollendis*,

§ 10.

⁴ Cod. 6, 2, *De furtis*, 20, 21 and 22; collated with Inst. 4, 1, *De oblig. quæ ex delicto nasc.*, § 16: 7, 5, *De dediticia libertate*, and 6, *De latina libertate tollenda*; collated with Inst. 1, 5, *De libertis*, § 3: 8, 48, *De adoptionibus*, 10; collated with Inst. 1, 11, *De adopt.*, § 2.

543. Justinian represents the fifty Decisions and the contemporary constitutions as having been connected with the execution of his project of amalgamating the ancient law (*ad commodum propositi operis pertinentes*), and as having led to the completion of that work in the publication of the Institutes and of the Digest;¹ it is, indeed, as a preparation for the construction of this edifice that these publications are of interest.



SECTION CVII.

THE DIGEST OR PANDECTS (*Digesta*, *Pandectæ*).²

544. These names had been given by certain jurists to extensive treatises on law: that of *Digesta* was the more ancient; *Pandectæ*, a Greek form, belonged to a more recent date.³ Justinian adopted them for his code, in which he designed to amalgamate and to arrange the whole system of ancient jurisprudence. The constitution, in which he develops this project, is addressed to Tribonian; it is dated A.D. 530, in the same year in which he had published a large number of his fifty Decisions; a proof that the two works were coexistent in design, and that one was by anticipation a preliminary step towards the other. The following is the analysis of the constitution:—

“To Tribonian.

“After the code of the imperial constitutions which we have published in our name, we have resolved to make a complete revision of the whole civil law, and of all Roman

¹ *De emendatione Codicis* (constitution iii. at the head of the code), § 1: “Postea vero cum vetus jus considerandum recepimus, tam quinquaginta Decisiones fecimus, quam alias ad commodum propositi operis pertinentes plurimas Constitutiones promulgavimus: quibus maximus antiquarum legum articulus emendatus et coarctatus est, omneque jus antiquum supervacua prolixitate liberum atque enucleatum in nostris Institutionibus et Digestis reddidimus.”

² The word *Digesta* has a Latin etymology, *Pandectæ* a Greek one; the former signifies something methodically classified, the latter comprising everything.

³ Authors who had published Digests, according to the quotations which are to be found in the work of Justinian: Alphanus Varus, 40 books; Celsus, 39; Julian, 90; Marcellus, 30; and Cerebrius Scævola, 40.—Pandects: Ulpian, 10 books, and Modestinus, 12.

jurisprudence, by collecting together in a single code the dispersed volumes of so many jurists."

" § 3. We have entrusted you with the office of choosing for this work the most skilful professors, the greatest advocates; and accepting those you have presented to us, we order them to perform that work, but under your direction.

" § 4. Choose and correct all that has been written by the jurists whom the emperors authorized to interpret the laws (*conscribendarum interpretandarumque legum*). But as others have also written books of law, which have neither been recognized as texts nor in practice, we do not desire to have them incorporated in your collection.

" § 5. From this collection we have determined to draw up a work of the utmost perfection, to be sacred as a temple of justice, to be in fifty books, divided by titles according to the order observed in our code, or in imitation of the *Edictum Perpetuum*, as you may think best. In these fifty books, let all the ancient laws, thrown into confusion during the course of nearly fourteen hundred years, be expurgated, and surrounded as it were by a rampart, beyond which there shall be nothing more: equal authority being given to all jurists, and no preference observed for one above another." (This is an allusion to the preponderance which the *lex de responsis prudentum* gave Papinian in case of a division.)

" § 6. Do not set down one opinion as the best because a majority has adopted it; one alone, and the least, might by chance, on a certain point, surpass all the others.

" Do not absolutely reject the notes of Ulpian, of Paul, and of Marcian on Papinian, which were formerly denuded of all authority on account of the honour paid to the most illustrious Papinian;" (This is an allusion to the constitution of Constantine, and to the *lex de responsis* which had proscribed these notes); "but do not hesitate to take and lay down as law whatever you shall think fit. The decisions of all the authors you quote will have authority just as if they emanated from the imperial constitutions and were given forth by our divine breath (*et nostro divino fuerant ore profusa*)."

" § 7. Eliminate everything which may appear to you out of

place, superfluous or bad; the corrections you make, even contrary to the ancient laws, will have legal force; and let no one dare, by making comparisons of ancient manuscripts, to impute any imperfection to anything which you shall have written." (This is an allusion to the same enactment which required a collation of quoted passages with the old manuscripts.) "The sanction which we give it is not divided between these or those fragments of the founders of the laws, but comes entirely from us, entirely from the choice we make. How should antiquity abrogate any of our laws?"

§§ 8, 9 and 10. "Do not leave any *antinomy*" (the name in Greek for a contradiction between two laws), "any repetitions; avoid as much as possible inserting anew the imperial constitutions contained in our code; put aside all things that have fallen into disuse.

"§ 11. Everything will be ruled by these two codes—the code of the constitutions, and that, to be drawn up, of the revised laws; and, if we promulgate a third, in the shape of institutes, that code also, in order that learners, after being grounded on principles, may proceed to higher and more abstruse studies.

"§ 12. This work will bear the name of *Digest* or *Pandects*; we forbid jurists to add commentaries and to obscure it with their prolix observations, as was done in the case of the ancient laws." (This was one of the acclamations of the senate at Rome on the reception of the Code of the Constitutions: Justinian however did it more than once. The legislator easily believes that there is nothing to come after the code which he publishes, and supposes that his formulas can settle facts or supplant science.) "It will only be allowed to add under each article a summary indicating its contents, which is called *παρατίτλα*, without interpretation.

"§ 13. We forbid, in writing this code, the use of signs or abbreviations, confusing enigmas, sources of numerous antinomies. The succession of letters must be used everywhere, even to indicate the numbers of the articles, or what not." (This injunction was addressed to the copyists, who were much given to the use of signs or abbreviations, and it will be repeated

again in other constitutions, with penalties attached.) "Given the 18th of the Kal. of January, A.D. 531 (15th December, A.D. 530)."¹

545. The coadjutors of Tribonian were sixteen in number, whose names Justinian will give us further on: they finished the Digest in the space of three years. This rapidity for an immense work was incompatible with accuracy. The recommendations of Justinian were not always followed. We find occasionally in the Digest confusion, repetitions and *antinomies*, the number of which, prodigiously increased by the commentators, still exercises the patience of those who devote themselves to reconciling them. But this work, besides its great practical use to the empire of Justinian, is of the utmost value to us, in spite of mutilations and alterations, as a monument of Roman law. It has preserved in the formulæ given by the accredited authors the principles of the ancient laws, the provisions, sometimes even the text, of a great number of *leges*, *plebiscita* and *senatûs-consulta*. It is composed, like a kind of mosaic, of fragments taken from thirty-nine of the most eminent jurists: each of these fragments bears the name of the author and of the work from which it was drawn, so that we gain information from it of the fact of the existence and the personality of these numerous jurists, as well as of the nomenclature, so varied, of their books. Nevertheless too much trust must not be placed in the purity of the text handed down. Whether to efface the traces of abrogated institutions, whether to substitute new solutions for those formerly given, or to reconcile the different fragments, or to secure greater lucidity, or for the sake of brevity, or for other reasons, the writers of the Digest made ample use of the licence they had received to change and correct the quotations, and some jurists never broached that which the Digest causes them to say. These alterations, by suppression, by addition, by arrangement, are called *interpolationes* (readjustings), *emblemata* (insertions) of Tribonian, or more laconically *tribonianisms*. An impartial criticism will

¹ *Prefationes*, 1, *De conceptione Digestorum* (at the head of the Digest).
Reproduced in Cod., 1, 17, *De veteri jure enucleando, et de auctoritate jurisprudentium qui in Digestis referuntur*.

detect the traces of these defects by demonstration, but will not be too ready to suggest them for the sole purposes of a thesis.

546. We are indebted to a German jurist, M. Blume, for an ingenious work, in which this author has examined whether it would not be possible, in observing the manner in which the fragments are grouped and follow each other under each article of the Digest, to explain the course which the commission instituted by Justinian followed in its operations.¹ On a careful inspection of these different fragments, we cannot help observing that they do not appear promiscuously, but that they seem to group themselves into three distinct series, which M. Blume has thought proper to designate as the Series of Sabinus, the Series of the Edict, the Series of Papinian. Not that each of these series is composed solely of works answering to these names; each of them, on the contrary, contains a great number which are foreign to them; whence it follows that this classification can only be accepted for the sake of brevity, as indicating at least the most salient characteristics of each series.²

It is to be noted also that the order of these three series corresponds to the order of the first three years' instruction in the schools of law, whether by the old or by the new regulations of Justinian, according to the description which we shall shortly have to give of them; a correspondence which does not

¹ Blume, *Order of the fragments in the articles of the Pandects* (Journal for the historical science of the laws, iv. 6, p. 257, in German).

² 1st Series: Extracts from the commentaries of divers jurists (Pomponius, Ulpian, Paul) on the writings of Sabinus (*ad Sabinum*); from the commentaries on certain parts of the edict (*ad Edictum*); from the digests of Alfenus Varus and Julian; from the institutes of Gaius and others (Callistratus, Paul, Marcian, Florentine); from the rules (*Regule*), a title under which a great number of jurists have written (Neratius, Gaius, Pomponius, Cervidius Scævola, Paul, Ulpian, Licinius Rufinus, Marcian); and lastly from a very great number of other works. 2nd Series: Extracts from the commentaries on the

remaining parts of the edict (*ad Edictum*, *ad Edictum provinciale*); from the commentaries of divers others (Javolenus, Neratius, Pomponius, Paul); on the writings of Plantius (*ad Plantium*); from the digests of Celsus and of Modestinus; and from a great number of other works, principally from Modestinus. 3rd Series: Extracts from the questions, answers and definitions of Papinian; from the questions and answers of divers others (Neratius, Africanus, Marcellus, Cervidius Scævola, Callistratus, Tertullian, Paul, Ulpian, Modestinus, Julius Aquila), and from many other works; with an appendix of a few other writings, added, apparently afterwards, as a supplement, amongst which is principally the digest of Scævola.

exist, it is well to remark, in all points, but only in some : notably as to the first series in the *Institutes*; as to the second in the *Edict*; and as to the third in *Papinian*.

From the preceding observations, we may conjecture, that the commission, composed of sixteen persons, besides the president, *Tribonian*, was divided into three sections, in each of which there figured four professors of law, who were ranked according to the order of their schools; that the works to be despoiled were divided between these three sections or sub-commissions, according to the three series we have just pointed out, most of the commissioners having allotted to them the works with which they were best acquainted; finally, that each section, having separately formed its extracts for the successive composition of each article which was to be taken in hand, all these extracts were afterwards united, and so made up the article in question.

Then the question occurs whether the extracts were first made by each commissioner individually from the set of books which had been given him to despoil, or were they made together in each section, for all the respective series of books attributed to that section; and was the form of the compilation finally fixed upon in a committee of the three united sections, or only by *Tribonian*, assisted by some of the commissioners according to the cases? These are all matters of minute detail which it is useless to discuss, unsupported as they are by any documentary evidence. No doubt, in the general division into fifty books, and in the affix of the number in each book, the order and the rubric of the articles, the compilers of the *Digest* of *Justinian* followed the model of the ancient authors, especially of the numerous *Digests* or *Pandects* composed in former times. The extracts from the three series of works by which the division of labour was effected do not always succeed each other, in each article, in the same order; the series which has supplied the most considerable extracts, whether in number or in importance, generally commences the article, though other considerations have determined, in certain cases, a different course. For instance, *Justinian* himself points out how, in order to introduce into the third year of legal studies the dicta of *Papinian*, and

to preserve to the students their surname of Papinianists, the fragments of Papinian were placed at the beginning of most of the articles of the Digest explained in that year.¹ Finally, the separation is not always radical between the series, the plan of the work having frequently caused fragments to be carried from one series into another; for example, at the beginning of an article appear the passages which explain the notion, the definitions or the preliminary principles, and at the end those which best expressed the conclusions. It is on this account that the distinction between the three series is not always recognizable at the first glance in each article, and that sometimes a very attentive examination is necessary to discern and follow the digressions. These conjectures of M. Blume are not wanting in probability, and are generally received at the present day.

547. The Digest or Pandects was declared to be in force from the 30th December, A.D. 529, by two constitutions, one in Latin, the other in Greek, the latter being a translation or paraphrase of the preceding one; each dated the 17th of the kalends of January, A.D. 530 (16th December, A.D. 529). These constitutions Justinian addressed to the senate at Constantinople, and to all the people. We give an analysis of them, retaining all the details of any interest.²

“ To the Senate and to all the Peoples.

“ It were a marvellous thing to reduce into one uniform shape all the laws of Rome, from the foundation of the city down to our own time, a period of nearly fourteen hundred years. After having invoked the aid of God, we have commissioned Tribonian, a high personage, with other very illustrious and very learned men, to carry out our design; all the results of their labours being first submitted to our royal investigation and scrutiny.”³

¹ See § 573.

² *Praefationes*, 2, *De confirmatione Digestorum*, ad Senatum et omnes populos. Reproduced in Cod. 1, 17, *De veteri jure enucleando, et de auctoritate jurisprudentium qui in Digestis referuntur*, 2°.

³ “ *Nostra quoque Majestas, semper investigando et perscrutando ea quæ ab his componebantur, quidquid dubium et incertum inveniebatur, hoc, Numine celesti erecta, emendabat et in competentem formam redigebat.*”

We observe here the work of final revision which Justinian personally reserves to himself, a reservation elsewhere expressed in the composition of the work.

§ 1. "After arranging the imperial constitutions in twelve books in the code which is adorned with our name, we have entered on a more considerable work, the revision and the arrangement of the whole of the ancient jurisprudence, comprising nearly two thousand volumes, and more than three million lines, which we have undertaken to read and examine in order to make the best selections; and we have collected the whole into fifty books, under the name of Digest or Pandects, reducing it to about one hundred and fifty thousand lines (that is to say, about a twentieth), and dividing it into seven parts, not promiscuously, but in order of numbers (*sed in numerorum naturam et artem respicientes*)."

§ 2 to 8. "The first part contains what the Greeks call *πρῶτα* (premises), divided into four books; the second into seven; the third into eight; the fourth, which is, as it were, the pith of the whole composition (*quæ totius compositionis quasi quoddam invenitur umbilicum*), into eight books; the fifth into nine books; the sixth into eight; and the seventh into six." (The text, in mentioning each part summarily, indicates the different subjects which are therein treated. This division of the Digest into seven parts is no longer, in the work of Justinian, of any practical utility.)¹

§ 9. "All these things have been brought to an end by . . . (Here follows the designation of the seventeen commissioners. Tribonian, who directed it; Constantine, *comes sacrarum largitionum*; two professors of law at Constantinople, Theophilus and Cratinus; two at Berytus, Dorotheus and Anatolius; besides eleven lawyers of renown occupying a superior position in Constantinople, whose names the constitution gives individually.)

"§ 10. Our respect for antiquity is so great that we have in nowise suffered the names of the jurists to be passed over in silence; each of them who was the author of a law (*qui auctor legis fuit*) is inscribed in our Digest. All the modifi-

¹ See § 573.

cations made in their laws (*in legibus eorum*), or even in the imperial constitutions quoted by them, are sanctioned by us, as if the whole had been written by ourselves, no one having authority to compare the text as it formerly stood with that which we have declared authorized.

“ § 11. But in order to afford beginners the opportunity of commencing their primary studies, so as to facilitate their subsequent progress to deeper subjects, we have charged Tribonian, and, under his direction, Theophilus and Dorotheus, to collect the divers works of the ancients, which contained the elementary exposition of the laws, and which were called *Institutiones*, to extract the passages which might be most useful and best adapted to the present time, and to form them into four books, with authority to exercise the same power of revision as in our other compilations. This work, when completed and laid before us, will be re-read by us (*nobis oblatum et relectum*), and will have the force of a constitution emanating from us.

“ § 12. The whole of this compilation of the Roman law in three volumes, the Institutes, the Digest or Pandects, and the Code, has been completed, by the favour of Almighty God, in three years—a work which, when it was begun, we scarcely hoped to accomplish in ten.

“ § 13. We notify this act of legislation to all. It is a collation of direct concise laws, placed within the reach of everybody, the text of which can be obtained by the poor as well as by the rich, for a small sum instead of the expense which would have been entailed in procuring a large and superfluous mass of volumes.”

§§ 14, 15 and 16. “ Should there be any repetitions or any apparent discordance—for there is no real discordance and no omission—it must be excused on the score of the imperfection of human nature; for it is Deity alone which fails in nothing.

“ § 17. These laws have been collected from so many volumes that the most aged men not only were ignorant of their names, but had never heard them mentioned. These volumes of ancient lore have been furnished for the most part by Tribonian, a most excellent personage, many of them being unknown even to

the most learned. The collectors of our work have read not only all the books from which our laws have been extracted, but also a great number of others, in which they have found nothing either useful or new fit to be incorporated into our Digest.

“ § 18. But as even Divine works are susceptible of improvement, and as there is nothing which can perpetually remain in the same condition, if there should arise any reason to add to or to modify the Code, wisdom and imperial power will minister to that want.

“ § 19. Conscript fathers, and all inhabitants of the terrestrial globe, render ye therefore thanks to the Supreme Divinity, which has reserved for your age so salutary a work! Venerate, observe these laws (*et adorate, et observate*). Let no one attempt, either before the judge, or in any other discussion where the law should intervene, to quote, or to point out any passage whatever of other books than our Institutes, our Digest and our Constitutions, arranged and promulgated by us, under the penalty due to the crime of fraud to the fool capable of such a deed, and to the judge who shall have suffered it in his hearing.

“ § 20. In order that it may be manifest from what legislators (*ex quibus legislatoribus*), from which of their works (*quibusque libris eorum*), and from what thousands of materials this temple of Roman law has been constructed, we have ordered the list of them to be placed at the beginning of our Digest. We have chosen the legislators or commentators (*legislatores autem vel commentatores*) who were worthy of so great a work, whose ability the princes, our predecessors, condescended to recognize, and we have invested them with an equal authority, no superiority of one over the other being recognized; for all the provisions adopted by us, having the force of a constitution promulgated by us, there can be no distinction.” (Has the register or catalogue here sanctioned by Justinian been transmitted to us? There is one, written half in Greek and half in Latin, at the beginning of a very ancient manuscript, called *The Florentine Pandects*, but the enumeration of the works of the jurists, from whose fragments the Digest was compiled,

is so incomplete that it is difficult to believe it is the original catalogue.¹ These jurists are thirty-nine in number. Though Justinian professes only to have made a choice of ancient authorized jurists, there are two amongst them, Hermogenianus and Arcadius Charisius, of too late a date to be reckoned in that class.² The expression *legislatores* should be noted, for there was no hesitation in applying it, in Justinian's time, to the ancient authorized jurists; and that of *leges*, applied to their writings: this is a point to which we have already called attention.)³

“ § 21. Let no jurist, at the present time or in the future, dare to annex commentaries to these laws: we only permit translations from Latin into Greek, and the summaries called *paratitla*, intended to describe the articles; but not *interpretationes*, or rather *persiones*. Penalties due to the crime of fraud are threatened on those who shall contravene this prohibition, and the destruction of their works.

“ § 22. The same penalties are applicable to those who shall, in future, write our laws in signs or abbreviations; everything, including the names of the jurists, the articles, the numbers of the articles, must be expressed, not by signs, but by letters. Let those who buy books written with signs in any portion whatever, know that they will have a useless property, as they will not be allowed to quote them before a court of justice. As to the writer, over and above the penalty of fraud, he will be bound to restore double the estimated value of the book to him who shall have bought, or caused it to be bought, in good faith.

“ § 23. The laws of these codes, namely, the Institutes or Elements, and the Digest or Pandects, will be in force from our third and blessed consulate, the third of the kalends of January

¹ D. Godefroy has given this catalogue, half in Greek half in Latin, at the beginning of his edition of *Corpus juris*; Pothier has given it in Latin in his Pandects (p. cxxxvi.), making the necessary additions to explain or complete it. We give it as an appendix at the end of this history. This catalogue only enumerates the jurists whose frag-

ments, headed by their name and by the title of the work from which each fragment is taken, form a law in the Digest, and not the large number of jurists whose opinions are quoted or copied therein.

² See § 534.

³ See § 525.

(30th December, A.D. 533), over all future or still pending suits before the judges, but not those settled by final judgment or by amicable arrangement, which we would not in any way disturb." (To give power to new laws, not only over future events, but even over still pending suits, is an abuse of the principle of retrospective operation, in regard to any law introducing innovation, and thus interfering with rights previously obtained; but not in regard to those which only interpret the pre-existing right.)

"§ 24. Let all our judges adopt these laws within their jurisdiction, and especially let the præfect of Constantinople and the three prætorian præfects of the east of Illyria and of Lybia have them published and made known to all within their respective jurisdiction.

"Given the 17th of the kalends of January, under the third consulate of Justinian (16th December, A.D. 533)."



SECTION CVIII.

INSTITUTES (*Institutiones, Instituta, Elementa*).

548. Even before the publication of the Digest, the emperor, as he had announced in his first constitution, *De conceptione Digestorum*, and as he says in his constitution *De confirmatione*, entrusted to Tribonian, Theophilus and Dorotheus, professors of law, one at the college of Constantinople, the other at that of Berytus, the duty of collecting together the different elementary treatises left by the ancients under the title of *Institutiones*, and of constructing thereupon a treatise of the same kind bearing the same title, intended to supply students with a simple abridgment of the principles of the laws. Works designed on this plan were not rare amongst the ancients; and judging only by those indicated to us in the Digest, we know that Gaius, Callistratus, Paul, Marcianus and Florentinus had published *Institutiones*; under other titles also had appeared other elementary treatises, such as the *Sententiæ* of Paul and the *Regulæ* of Ulpian, which have been in part handed down to us. The book designed by

Justinian, under the name of *Institutiones* or *Elementa*, was speedily completed; it was extracted, to a great extent, from the ancient elementary treatises which we have just pointed out, and especially from the Institutes of Gaius, which had the greatest reputation. Since we have been able to compare them we have found that, in the division and the order of the subjects, there are numerous passages which are identical. But in the Institutes of Justinian the different fragments have not been, as in the Digest, separated, and the sources from which they have been taken have not been indicated: they are all confounded and mixed up with the explanations, and the new theories which the editors of the Institutes themselves gave, so as to form a consecutive exposition.

549. This treatise, though it was only, so to speak, a book intended for schools of jurisprudence, nevertheless received the character of laws. It was commenced long before the Digest, and was published nearly a month before (22nd November, A.D. 533) by a special constitution, which serves as a preamble (*præmium*) to the Institutes. But these two legislative works could only have come into force from and after 30th December, A.D. 533.¹



SECTION CIX.

NEW EDITION OF THE CODE (*Codex repetitæ Prælectionis*).

550.

“Justinian to the Senate of Constantinople.²

“Since the publication of the Code, in which we have caused the imperial constitutions to be gathered together in one collection (*in unum corpus colligere*), and purged from all defect (*omnique vitio purgare*):

“§ 1. Having resolved to proceed to the revision of the ancient laws, we have published fifty decisions and many other

¹ For more ample details, see M. Ortolan's article “Institutes,” vol. ii., at the commencement of *L'explication historique des Instituts*.

² Const. iii., at the beginning of the Cod. *De emendatione codicis de Justiniani*.

constitutions connected with the execution of this project (*ad commodum propositi operis pertinentes*); and, finally, the whole of the ancient law, amended, freed from all superfluous polixity and elucidated, has been exhibited in our Institutes and Digest."

§§ 2 and 3. "But the fifty decisions and the new constitutions not being found in the body of our Code, to which they are posterior, and many which were there wanting correction, we have commissioned Tribonian, the director-general of all our legislative measures, Dorotheus, professor of law at Berytus, Menas, Constantine and John, lawyers of the highest rank in Constantinople, to unite, under the articles to which they belong, the new constitutions to the former ones, and, without scruple, to suppress whatever appears to be superfluous, abrogated provisions, repetitions, or contradictions. No one is ignorant of the advantages of a second edition. We find amongst ancient books not only first but second editions, to which the ancients gave the name of *repetitæ prælectiones*."

§§ 4 and 5. "This new work has therefore been undertaken by us; and we order a second edition of the Code to be prepared; and we forbid that from the 4th of the kalends of January, of the year of our fourth consulate (29th December, A.D. 534), anything to be quoted, before the judges, from the fifty decisions, from the previous constitutions, or from the first Code, except what is to be found in the second edition. If, hereafter, any amendment should be deemed useful, we will provide for it by constitutions which shall form a collection by itself (*in aliam congregationem*), under the name of new constitutions" (*novellæ constitutiones*). (We would not attribute, like Puchta, this last provision to the desire of reassuring purchasers of the second edition against the inconvenience experienced by the purchasers of the first, that is to say, against the fear of being forced, after a while, to purchase a third. This would be to take a narrow view of the matter, for there were better reasons for the step being taken, such as the dignity and reputation of the Code itself and the example of what had previously been done with the Theodosian Code and the collection of subsequent *Novellæ*. Then follows the same prohibition as that published in the case of the Institutes and the Digest, against writing any

part of the Code in signs or abbreviations.) “ Given at Constantinople, the 16th of the kalends of December, in the fourth consulate of Justinian ” (17th November, A.D. 534).

551. This new edition is the one we possess: the first, which had fallen into disuse, is unknown to us. This Code is, like the first, divided into twelve books: it contains several constitutions less, which have been suppressed; so it happens occasionally that the Institutes refer back to certain passages not contained in the new Code, and which were probably in the first. The constitutions are placed under different articles, with the names of the emperors to whom they belong, but they have been altered in the same manner as the fragments of the jurists. The most ancient is that of Adrian, from which some writers have concluded that the imperial constitutions date only from this prince—an opinion seldom advanced in these days.



SECTION CX.

NOVELLÆ CONSTITUTIONES—AFTERWARDS AUTHENTICÆ, CORPUS AUTHENTICORUM.

552. The name of *Novellæ constitutiones* (by abbreviation *Novellæ*) had already been given to constitutions published subsequently to the Theodosian Code, by Theodosius and his immediate successors. Justinian, whose reign lasted more than thirty years, after his collection of laws was completed, promulgated, as he had announced in the constitution referring to the second edition of his Code, numerous *Novellæ* which often modify the Digest, the Institutes and the Code. This began the very year following that in which the second edition of his Code was put in force, that is to say, from A.D. 535, and continued decreasing every year from A.D. 543, the date of the death of Tribonian, up to the death of Justinian in A.D. 565. Dividing this space of thirty years into quinquennial periods, out of one hundred and forty-six *Novellæ* of which it is possible to fix the date with certainty, or at any rate with probability, we find one

hundred and eight in the first period and only twenty in the second, six in each of the two following, and three only in each of the latter.

553. Whilst Latin was the national language of the State, in which the legislative works of Justinian were written, Greek was in Constantinople and amongst the Byzantine population the vulgar tongue. It was in Greek that most of the *Novellæ* were promulgated, which made a greater distinction between them and the ancient laws, and did not increase the connection with the West, where Justinian only obtained a partial and precarious influence. A few *Novellæ*, however, were drawn up in Latin, and sometimes even in both languages. In Greek, says Justinian, for the use of the multitude (*propter multitudinis frequentiam*): in Latin, which will have no less force, by reason of this language being the representative of the Republic (*propter Reipublicæ figuram*).¹ This diversity or alternation of language has not been favourable to the preservation of uniformity. It has necessitated translation from one language to the other, which the Constitutions of Justinian permitted; some of these translations were made under Justinian, others after him, and there have been some even in modern times. Those intended for promulgation in Italy, which were ordered by Justinian, A.D. 554, must have been official translations, others are private works. This practice interfered with the accuracy and with the official character of these laws.

554. Justinian certainly intended that his *Novellæ* should form a continuation of the Institutes, the Digest and the Code. This he announced in the same constitution as that which directed the publication of the second edition of his Code (*et in aliam congregationem referatur*); but it is in the nature of such a work for its author to continue his labours throughout his whole career, and consequently to die, leaving it incomplete. We see by several passages from the *Novellæ* that they were

¹ Novel. 66, ch. 1, § 2: "Alia quidem Græcorum lingua conscripta propter multitudinis frequentiam, alia vero

Latina, quæ etiam firmissima, propter Reipublicæ figuram, est."

deposited in the archives of the empire (*in sacro laterculo deponi*); and that there existed a book, volume or collection of laws in which they were inscribed (*in libris legum transcribi*; *legum volumen*; *sacrarum nostrarum Constitutionum volumen*; *sacrarum nostrarum Constitutionum lectio*).¹ They came to take their place there, as our laws, ordinances or decrees take theirs in our archives,—a mass of fragments not published but heaped together, with no other connection but that of chronological arrangement, and that with occasional blanks. It is doubtful if the *Novellæ* ever bore any other character.² Were they ever collected and published by Justinian, or say, by Justin II., his immediate successor? This matter is open to doubt, though it must be acknowledged that there is no trace of the text of any constitution ordering anything of the kind, as was done for the other collections of Justinian, and that it would be strange, supposing such a constitution to have been passed, if the text had not been reported or quoted somewhere. One thing is certain, viz., that different collections, more or less

¹ Nov. 17, *De mandatis Principum*, Præf.: "Eadem mandata et in libris legum transcribi, et in sacro laterculo deponi præcipiat." Nov. 24, *De præside Pisidiæ*, ch. 6, pr.: "Sacra mandata jussimus in sacro laterculo reponi." § 1: "Hanc sane legem tum sacrarum nostrarum Constitutionum lectio monstrabit; jussimus enim et hanc inter eas describere." Nov. 25, *De prætore Lycaonia*, Epilog.: "Præsentem itaque legem Nos quidem sacrarum nostrarum Constitutionum volumini jussimus inseri." Nov. 26, *De prætore Thraciæ*, in fine: "Atque hanc sane præsentem legem habebit quidem legum volumen."

² Paul Warnefride, known under the name of Paul the Deacon, born about 740 at Cividale (the ancient *Forum Julii* of Venetia), who, after having been secretary of Didier, king of the Lombards, and after having lived at the court of Charlemagne and that of the Duke of Benevent, died in 801 at the monastery of Monte-Casino, has inserted in his history of the Lombards (*De gestis Longobardorum*) a short chapter devoted to the reign of Justinian. He has there exactly and laconically described the Code, the Digest or Pan-

dects, and the Institutes; and as to the *Novellæ* he expresses himself thus: *Novas quoque leges, quas ipse statuerat in unum volumen redactas, eundem codicem Novellarum nuncupari sancivit.* (This work will be found in the first volume of *Rerum Italicarum Scriptores* by Muratori.) Here is testimony showing the *Novellæ* to have been united in one volume or code by the orders of Justinian himself. It is true that it is the testimony of a historian and not of a jurist, in the eighth century only, and it has been supposed, rather gratuitously, that it was the abridged volume of Justinian which he had before him. The assertion of a learned Greek canonist, patriarch of Constantinople in the time of Justinian himself, John of Antioch, surnamed Scholasticus, is usually urged in opposition to this, but we shall show in another place how that quite a different interpretation may be placed on the passage of John of Antioch, so that the question remains doubtful. We are rather inclined, however, in the absence of more certain proof, to deny the fact of a Code of *Novellæ* ever having had a fixed and official character.

extensive, have been made from different quarters, as private works; there are others whose character is doubtful; and it is in this form, good, bad, or indifferent, that the text of the *Novellæ* has reached us, but we possess none in an official form.

555. The collections known to us, having undoubtedly a private character, are those of John of Antioch, surnamed Scholasticus, and that of Julian. There are two remarkable points about these collections which are calculated to inspire some confidence in their genuineness; one is the position of the authors, and the other the time when they appeared, that is, shortly after the death of Justinian.

John, a learned ecclesiastic, who was, during the reign of Justinian, a priest (*presbyter*) of Antioch, published a collection of the sacred canons, extracts from the books of the apostles, from the councils or synods, and from the fathers of the Church. This book, which was in Greek, was divided into fifty titles; perhaps in imitation of the fifty books of the Digest. One year before the death of Justinian (A.D. 564) he was nominated, by the emperor, patriarch of Constantinople, and replaced Eutychius, who was exiled. While occupying this post, which he filled till the year A.D. 578, he undertook and completed the labour of arranging, under each of the titles of his collection of canons, the corresponding provisions of the *Novellæ* of Justinian. This work, also published in Greek, was entitled by him *Νόμοναυδν*, a title at a later period adopted by Photius, another patriarch of Constantinople. Although well known to the canonists, the work has been too much neglected by the historians of the civil law. It was compiled with a definite object, and only contained extracts from the *Novellæ* bearing upon ecclesiastical law. The passages quoted from the *Novellæ* are not given in their integrity, but are cut up into fragments and analyzed according to the title of the canon under which they are placed, and are without date; but the classification is valuable, because each extract is numbered, and the numbers doubtless indicate the date to which each belonged: and it is well worthy of notice, that neither of these numbers, ex-

cept that of *Novella VI.*, agrees with those which the *Novellæ* in our collections bear. It is customary to regard a passage from this book as a proof that the *Novellæ* of Justinian were never codified, but this passage is susceptible of another rendering. It may be, on the contrary, that John was alluding to the design of a Code, and that the *Novellæ* scattered here and there in this Code, which it was necessary for John to search out and collect, are those relating to ecclesiastical law, the different provisions of which he transcribed, following the order of his titles of the canon law, thus frequently mixing extracts from the Code of Justinian and from his Digest under the rubric, *Leges cum hoc titulo concordantes*.¹ John of Antioch has done much by the labour he underwent in collecting and arranging these scattered materials.

As to Julian, he was, in the time of Constantine, a professor of law in the public school of Constantinople, and a successor of Theophilus and of Cratinus; he published, either during the life of Justinian, or, according to others, shortly after his death, A.D. 570, an abridgment of the *Novellæ*, in Latin, under the title of *Juliani Novellarum Epitome*. This collection, which is divided into two books, only contains a hundred and twenty-five *Novellæ*, which are not given in their entirety, but abridged. Though thus limited in extent, it is a collection on which the utmost reliance may be placed, inasmuch as its origin is certain, and it was written by a person of considerable aptitude for the task and who had access to contemporary documents. The book was no doubt intended chiefly for elementary instruction. Biener, in his *Histoire des Nouvelles de Justinien* (1824), started the idea, subsequently adopted by Puchta and others, that this Latin abridgment was made by Julian in order to facilitate the application of the *Novellæ* to that part of Italy which was

¹ There is in France a good edition of the two collections of John of Antioch, with Greek text and Latin translation, in the second volume of the *Bibliotheca juris canonici veteris*, by Guil. Noell and H. Justel, Paris, 1661. The Latin translation of the passage alluded to in the text occurs at p. 603 in the preface of the first title of the *Nomocanon*: "Ea quæ

cum . . . sacris Canonibus conjuncta sunt, e divinis novis constitutionibus, quæ secundum codicem a divinæ sortis Justiniano promulgatæ passim dispersæ sunt, transcripsi." We may notice that even the fathers of the Christian Church used the expression "divine" when speaking of the *Novellæ* and of Justinian.

subject to the empire. That this may have been partly Julian's design is most probable; but it is clear that a professor of law at Constantinople, in the habit of explaining to his students the Roman law, as contained in the text of Justinian, in the original and national language (*propter reipublicæ figuram*), would be compelled to make his abridgment of the *Novellæ* in that language. The population of the empire, it must be remembered, spoke two different tongues. Justinian had foreseen the necessity of, and had authorized, translations. Theophilus produced a Greek paraphrase of the Institutes, and Julian, his successor, a Latin abridgment of the *Novellæ*. As to Italy, we have every reason to believe that when the *Novellæ* were published by the order of Justinian, A.D. 554, they were translated into Latin entire and not abridged.

Such are then the two private collections which we possess, the character of which is unquestionable: that of John of Antioch having been framed for a definite object and useful only in respect to certain historical points concerning the *Novellæ*; the other, that of Julian, embracing, if not all the *Novellæ*, at least the greater part, but only by way of abridgment.

It is precisely on account of the fact that it was an abridgment that the abridgment of Julian was more widely circulated, and more particularly in Italy by reason of the language in which it was composed, and at an early date in Gaul, where it was known before other parts of the laws of Justinian, which were never promulgated there. The work was therefore, in the middle ages, frequently called by the simple title *Novellæ*. A number of copies are extant, some of which have been recently discovered, and several editions have been published, amongst others that of Ant. Augustinus, in the sixteenth century, and that of the brothers Pithou.¹

556. The collections, the origin and character of which remain doubtful, but which have the great advantage over those

¹ Ant. Augustini *Collectio constitutionum græcarum Codicis Justiniani, et Juliani Novellarum epitome, cum paratitlis et scholiis*. Herdæ,

1567; Basileæ, 1576. Pet. et Fr. Pithæorum, *Observationes ad Codicem et Novellas Justiniani*, Paris, 1689.

already mentioned of giving the text of the greater part of the *Novellæ* entire, are only two in number, one in Latin the other in Greek.

The Latin collection, which contains a hundred and thirty-four *Novellæ*, with Latin translations of those which were promulgated in Greek, was, at an early date, widely circulated in Italy under the name of *Authenticæ*, as to the *Novellæ*, and of *Liber* or *Corpus authenticarum*, or, more briefly, *Authenticum*, as to the collection. Several manuscript copies have descended to us; but their source remains unknown. It is a common mistake to connect the name *Authenticæ* with an anecdote about Irnerius, and which is dated at the period when this chief of glossators recognized the authenticity of the text, which he had at first denied; the name *Authenticæ* existed at an earlier period, and the anecdote, whether true or false in itself, is a proof of this fact. The fact was that, in a certain lawsuit in which he was concerned, a text from this collection was quoted, under this title, against him, when he exclaimed, "Look elsewhere, my good man!" (*Vade bone homo!*) adding that this book was not the work of Justinian, but of some monk, and that consequently it was not authentic; and it is also under the same title that, in one of his earlier glosses upon the Code, he gives various grounds for disputing its authenticity.¹ This title existed long before the glossators, whether as distinguishing it from the abridgment of Julian, or, what is more likely, it was handed down by a tradition which represented these texts of the *Novellæ* as the texts which had been promulgated in Italy, about the year A.D. 554, by order of Justinian. The same tradition represented this Latin version (the author of which is unknown) as that promulgated in Italy under the title which it bore of *versio vulgata*. Some critics have quoted, in support of this opinion, the passage of Paul the Deacon, given by us in

¹ Irnerius, *De emendatione Codicis*, § 4: "Hinc argumentum sumi potest quod liber iste, id est *Authentica*, sit repudiandus. Ejus enim stylus cum ceteris Justiniani constitutionibus nullo modo concordat, sed omnino inter se discrepant. Item ejus libri principium nullum est, nec seriem nec ordinem

aliquem habet. Item *Novellæ* istæ constitutiones, de quibus hic loquitur, non promittuntur nisi de novis negotiis et nundum legum laqueis innodatis." (Quoted by Savigny, *Hist. du droit Romain au moyen-âge*, t. 3, p. 346 of the translation from the MSS., Munich, No. 22, and Vienna, No. 15.)

the note to paragraph 554 ; but it is clear, from its perusal, that no reference is there made to its being a translation.

The name *Authenticæ*, which does not belong to the time of Justinian, but is of later date, for a long period almost supplanted that of *Novellæ*, and was in common use in legal works, at the court, and in literature ; so much so, that the expression is met with, in ancient authors, to “authenticate” a woman, or a woman “authenticated,” meaning a woman treated as prescribed in Nov. 134, cap. 10, in the case of adultery.

The *Authenticum* was modified, both in its form and contents, by the glossators,¹ and the manuscripts which have been transmitted to us through that channel are, in consequence, more or less defective. M. de Savigny mentions one at Vienna, in which one only is wanting of the whole hundred and thirty-four *Novellæ*. M. Heimbach has availed himself of this to give an edition as far as possible free from the alterations of the glossators, and in other respects as pure as possible.²

557. The only other collection to which attention is directed, which has given us the *Novellæ* in Greek, is, like the last, of unknown origin. Of this collection there are two manuscript copies, one at Florence and the other at Venice, and these two mutually supply the blanks that occur in each other. There are altogether one hundred and sixty-eight documents, each bearing its own number ; and amongst them are intercalated, towards the latter numbers, certain *Novellæ* of Justin II. and Tiberius II., the two immediate successors of Justinian, and two edicts of the prætorian præfects ; under the other numbers, down to one hundred and fifty-nine, we have the constitutions of Justinian. Among these however are four which, with the exception of slight variations, appear in duplicate : this is explained in the one case by its having been promulgated in the two languages, and the translation of the Latin into Greek

¹ Of the one hundred and thirty-four *Novellæ* of the *Authenticum*, the glossators have detached thirty-seven as being inapplicable to their time, and these they have called “extravagant” or “extraordinary ;” the others, ninety-seven in all, were called “ordinary.”

The whole have been divided, like the Code, into twelve parts, called *collationes*.

² G. E. Heimbach, *Authenticum : Novellarum constitutionum Justiniani versio vulgata*. Leipsic, 1846—1851, 2 vols.

having caused a repetition in the collection; and in the other, by the fact that the same constitution was addressed, with slight variations, to different parts of the empire. In addition to these there are three which belong to a special collection of thirteen constitutions, which are not styled *Novellæ*, but *Justiniani imp. Edicta*. If we deduct these four duplicates and three edicts, we have in this Greek translation a hundred and fifty-two different *Novellæ* of Justinian.¹

The language of the *Novellæ* in this collection has suggested the belief that we have here the text of those originally promulgated in Greek; and, so far from the fact that certain constitutions appear in duplicate, and that there are to be found intercalated in the latter numbers certain *Novellæ* of Justin II. and Tiberius II., and two edicts of the prætorian præfect, being unfavourable to this view, we take it as a strong indication of its being original. The compiler probably made his collection under Tiberius II., certainly not before. The arrangement is not good, or it is perhaps better to say that there is none. But what is of importance to us is the fact of the text being original. The better arrangement for a series of documents like these would have been an exact chronological order. This however has not been observed either in the Greek or in the Latin collection of the *Authenticum*. Besides this, and this is the greatest defect in both these collections, a great number of the *Novellæ* do not bear any date, or have only an incomplete date. Critical labour is therefore necessary to determine these dates with anything like accuracy, and in many instances they can only be arrived at approximately.

The Greek collection was edited for the first time in 1531, from the Florentine MS., by Greg. Haloandre, with a Latin translation, and, in 1558, from the Venetian MS., by Henr. Scrimger Scot. Several Greek editions have followed, and

¹ The ancient editors or commentators, and Cujas, in his *Exposition des Novelles*, have remarked that the numbers 140, 144, 148 and 149 of the Greek collection are the *Novellæ* of Justin II.: the numbers 161, 163 and 164 those of Tiberius II., and the two numbers, 167 and 168, the edicts of the prætorian

præfects; that as to the rest, except slight differences, there is repetition between the numbers 32 and 34, 41 and 50, 75 and 104, 143 and 150; and that, finally, the numbers 8, 111 and 122 belong to the thirteen edicts of Justinian.

even in the eighteenth century other Latin translations appeared, which are considered more correct, more elegant, and in purer Latin, than the *versio vulgata* of the *Authenticum*.

558. To the four collections to which we have already referred, that of John of Antioch, the epitome of Julian, the *Authenticum*, and the Greek collection, must be added a MS. in the royal library of Paris, which contains an index or catalogue in Greek of the *Novellæ*. Cujas published the translation of it in Latin, at the head of his commentary, in the second volume of his work, and the Greek text was produced in Germany in 1840. This catalogue appears to have been prepared as a kind of table of the Greek collection. Like the original collections, it is free from the divisions and subdivisions introduced by the glossators, and is confined to a classification under one series of numbers, each novel being designated by its rubric. These rubrics to a certain extent differ from those in common use; they are in general more brief, but they refer to the same constitutions.

559. Such are the materials from which our present edition of the entire body of Justinian law has been prepared. These editions have been confused, both by the use of the name *Authenticæ* and by the division into nine *collationes*, and the subdivision into titles (each *Novella* forming one),—distinctions which originated with the glossators, which are in themselves useless, and which are not to be met with in the *Novellæ* of Justinian. It is now the common practice to quote the *Novellæ* by their numbers.

560. Of the hundred and fifty-two different *Novellæ* of Justinian to which we have alluded, thirty refer to ecclesiastical matters, fifty-eight to the administration of the public or criminal law, and sixty-four to private law. Those portions of the works of the ancient Roman jurists which are inconsistent with an advanced civilization here rarely make their appearance, or are altogether discarded; while principles more adapted to further the improvement and progress of mankind are allowed to have

their sway. It is impossible to read such passages of the *Novellæ* without giving them our cordial approbation and sympathy. We find, indeed, side by side with some of the defects of earlier institutions, certain points, such as the succession *ab intestato*, well worthy of our consideration.



SECTION CXI.

CORPUS JURIS CIVILIS.

561. The whole collection of the Institutes, the Digest, the Code and the *Novellæ* is called the *Corpus juris*, or more commonly the *Corpus juris civilis* by way of antithesis to *Corpus juris Canonici*. In the text of Justinian, and even anterior to him, we meet with the expression *corpus*: for example, in connection with the jurists, *Papiniani corpus*; and the codes, *ex corpore Gregoriani, Hermogeniani, Theodosiani*, and in allusion to the *Breviarium Alarici*, *in hoc corpore*, and to Justinian's code, *in unum corpus colligere*. But as a technical expression used to express the whole body of Justinian's law with certain additions,¹ we derive the term from the glossators.

The various fragments which are scattered and separated from each other, of which the Code and the Digest are to a great extent composed, have for a long time been designated *leges*. Many authors, however, when referring to the Code, prefer to call them, in the Code, *constitutiones*, and, in the Digest, *fragmenta*. These titles are more in conformity with the general history of Roman law, inasmuch as they indicate the origin and essential character of the passages quoted. The word *leges*, used by Justinian himself, is more suitable to the character of the Code and of the Digest; as passages inserted they have acquired thereby an imperial authority (though in fact for the most part they enjoyed this previously), and have thus become in the proper sense of the term *leges*, that is, in the sense in which we now understand that word. We know how

¹ Constitutions of different successors of Justinian; of the emperors of Germany, Frederick I. and II.; Apostolic

Canons; customs of the Lombards as to fiefs; Peace of Constance.

the term *leges* was frequently applied by Justinian, not merely to provisions contained in the Institutes, in the Digest, in the Code and in the *Novellæ*, but also to the *sententiæ* or decisions of the authorized jurists.

The mode of quoting the Code and the Digest is not uniform, but with all authors of works published before the time of the glossators, whether in the East or West, we find only the numbers showing the position of the book, of the title and the passage quoted, to which are sometimes, though rarely, added the commencement of the passage; but since their time, for the convenience of quotation and for the sake of accuracy, numbers were added, which of themselves convey little idea to the mind; the commencement of the sentence, however, gives a clue to the subject. This change in annotation served, in the opinion of Savigny, as a means of judging of the antiquity of the MSS., whether they are anterior or posterior to the school of glossators. The practice of indicating the first word of the rubric of the title as well as of the *lex* and of the paragraph was observed by the older French jurists, as may be seen from the following quotation from the burlesque of Racine, *L'Intimé des Plaideurs*:

“ Qui ne sait que la loi *Si quis canis*: DIGESTE,
De ri; paragrapho, Messieurs, *Caponibus*,
Est manifestement contraire à cet abus ?”

We now adopt the numbers, and it is well, lest there should be an error in the figures, to add the first word of the rubric of the title, and by way of historical allusion the name of the emperor or the jurist who was the author of the passage quoted.

It is scarcely necessary to add that in order to indicate the Digest or Pandects the sign *ff* is used, which is supposed to be derived from the Greek Π, or from the symbol of the copyists representing D.

562. Such were the results of Justinian's labours in the department of legislation. During this undertaking the emperor was engaged in carrying out his design of reconquering the various parts of the Western empire. It is generally said that his reign was as illustrious for feats of arms and achievements in the arts as for his legal reforms. Under Belisarius the dis-

cipline and the courage of the soldiers reappeared, and their bravery was crowned with triumph. Before the Institutes and the Digest had been promulgated, the kingdom of the Vandals had been overthrown in Africa; and that country, again attached as a præfectorate to the empire, was divided into dioceses and provinces, which were presided over by a præfect, by *rectores*, and by presidents, A.D. 533. And Justinian, who, in the titles of his laws, had contented himself with the common epithets of *Pius*, *Felix*, *semper Augustus*, added, when publishing his Institutes, the appellations of *Alemanicus*, *Gothicus*, *Alanicus*, *Vandalicus*, *Africanus*, and many others, to which he was in no way entitled.

Sicily soon followed Africa; Italy followed Sicily; and in time the Goths even abandoned Rome itself, the keys of which, as a mark of its subjection, were sent to Constantinople, A.D. 537. Captured and recaptured, however, by the barbarians and the troops of Justinian, the cities of Italy were not permanently reconquered. When, under the walls of Carthage, on the shores of Sicily, on the banks of the Tiber, the great Belisarius had rekindled in the East the ancient glory of the empire, the feeling of envy was aroused against him at the court. When for a whole year he had maintained a glorious defence in Rome, and, after raising the siege and overrunning Italy, had shut up the Gothic king in Ravenna, a treaty made by the emperor sacrificed the greater part of the advantages he had won, and he was recalled by an imperial order to Constantinople. No sooner had he carried his arms into the heart of Assyria and threatened the capital of the Persian king, thus forcing him to abandon the Roman provinces that he had invaded, A.D. 544, than an imperial order recalled the victorious general to Rome. Again he reappeared in Italy, where the safety of his former conquests had been menaced, but no sooner had he delivered Rome from the Goths, who had recaptured it, and taken measures which would have secured the complete overthrow of the barbarian power, than an imperial order again called him to Constantinople. Such was the system of refined persecution to which a great, a noble and a sensitive mind was exposed.

Belisarius was replaced by the eunuch Narses, who was

not unworthy of the trust, and who successfully completed the labours commenced by his predecessor. After delivering the whole of Italy, and making it over to the Emperor of the East, he was appointed, under the title of exarch, to the government of those countries, and established himself at Ravenna, which he selected as the capital of his exarchate.

In A.D. 559 Belisarius again rendered eminent service to his imperial master by driving the Bulgarians from Constantinople, but he finished his glorious career by falling a victim to court intrigue. He was accused of plotting against his imperial master, disgraced and despoiled of his dignities and his honours. It is true he was restored, but not till it was too late, though it was only in the following year, for he died. The poet and the painter have represented him as sitting by the wayside suffering from the loss of sight cruelly inflicted by an ungrateful master, or as led by the hand by a child, the only companion of his misfortune, begging out of charity, "an obolus for Belisarius." Thus had tradition, the poet and the artist imputed to Justinian a crime of which he was never really guilty.

563. The emperor did not long survive Belisarius, for he died A.D. 565, after a reign of thirty-nine years, being himself about eighty-four years of age. What judgment should history pass upon him? At a time when the study of Roman law was general throughout Europe, Justinian's character was the subject of much controversy; some attacked, others defended him, and the historians and the jurists occupied antagonistic positions in the discussion. There came to be two schools, the Justinianists and the anti-Justinianists. Montesquieu is far from sparing him. The worst part of Justinian, he said, was his profusion, his exaction, his rapacity, his rage for building, his inconstancy, the alternate weakness and harshness of his rule, which were the more disastrous from the length to which his reign was protracted. These were real evils for which useless successes and empty glory could not compensate. This is in substance a brief summary of the estimate formed of him by Procopius, Evagrius, Agathias and John Zonaras. Most of these reproaches are merited, and to them may be added his

weakness for Theodora, who ascended the throne of Constantinople as his consort after having frequently taken a part in the games of the circus and appearing on the stage, and after having inhabited the *Embolum*, the chief abode of prostitution. To this woman he more than once entrusted the sceptre that it was his duty to sway. His legislative measures are not sufficient to compensate for the defects of his moral character; and as the credit of his victories is due to Belisarius and Narses, so his laws are attributable to Tribonian and to his fellow labourers. At the same time, Justinian prided himself upon an acquaintance with philosophy, theology, the arts and the laws; he took pleasure in personally determining theological controversies, and in tracing the designs for monuments to be erected to himself; he also boasted of having revised the laws. The project which he conceived of codifying the law, though borrowed from previous efforts of his predecessors, should entitle him to the credit of a legislator; and he has the merit of having persevered in his intentions, and having brought his great work to a successful termination.

564. The jurists, and especially those belonging to the historic school, have bitterly reproached him for having mutilated the ancient authors, and for having misrepresented both their opinions and those of the emperors in his compilations. But is he to be regarded as a historian, or as a legislator? Was it his duty to give his subjects a correct view of the development of the science of law, or was he bound to furnish them with laws? We ought not to judge him from a point of view of our own selection, but we should regard his character in the light in which it must have been seen by an inhabitant of Constantinople and a subject of the empire. Besides, to be just, it is not to the handiwork of Justinian, but to that of barbarism, that we must ascribe the loss of the ancient manuscripts and legal documents. The greater portion of the reforms introduced by Justinian were judicious, for they were suited to the times. Discarding the useless subtleties then in vogue in the Eastern Empire, he created a system of law conspicuous for simplicity and equity. And certainly for the revival of legal

study in our own age, European writers have chiefly rested upon the body of laws promulgated by Justinian; the legislative measures of this emperor, which were attuned to the voice of nature and better adapted to human wants than the laws of ancient Rome, exerted upon European civilization an influence which never could have been exercised by the latter. It is unphilosophical to attack Justinian for his repeated changes, for the modification of the Digests and the Institutes by the Code, and the modification of the Code by the *Novellæ*, amendments that nullified each other; while his detractors do not scruple to add to this charge of irresolution the calumny that he divided with Tribonian the proceeds derived from an infamous traffic in the sale of judgments, and even of laws. As a matter of fact he accomplished a great work.



SECTION CXII.

TRIBONIAN OR TRIBUNIAN.

565. From more than one historian of this period we learn that Tribonian excited a revolt by his exactions when minister, and that the emperor, in order to appease the sedition, was obliged to banish him for a time. As a jurist he possessed a varied stock of information; he was well versed in the study of the ancient writers upon jurisprudence, and had, beyond doubt, an exceedingly-well stocked library at his disposal, for of the 2,000 volumes collected for the composition of the Digest, the acquisition of which must have involved an enormous outlay, and of which many must have been unobtainable, the greater part were furnished from his own collection. Justinian, in one of his constitutions, styles him the minister of all his legislative work (*legitimum operis nostri ministrum*). It was he who suggested projects and provisions (*suggerente nobis Triboniano*), and who directed the composition of the whole. And it is to him that to a great extent must be attributed the merits and defects of this work. And, certainly, his vast erudition, and his assiduous references to the writings of the great Roman jurists, had not narrowed his mind; for notwithstanding the respect

which he professed for them, and his attachment to what was obsolete in their systems, he knew how to raise himself to a level with the new order of things. He has left the traces of this in his laws, especially in the *Novellæ*, and this to us is the greatest proof of his intellectual power. After his death, which took place A.D. 543, the number of *Novellæ* published by Justinian decreased to such an extent, that, though the number during the life of Tribonian extended in the space of the first eight years immediately following the second edition of the code to about one hundred and twenty-five, reckoning only those the dates of which we are able to determine, only twenty-one appear after the death of Tribonian in a period of twenty-two years.



SECTION CXIII.

THEOPHILUS AND SOME OTHER PROFESSORS OF LAW.

566. Theophilus, who was a professor of law at Constantinople, took part in the compilation of the first Code, the Digest and the Institutes. One of his works which we possess, and which is of great value, is a Greek paraphrase of the Institutes, in the preparation of which he took part. It is true that attempts have been made to show that this Greek paraphrase was not made by him. The groundlessness of this objection is established in the opinion of all students of Roman law who accord to the commentaries of Theophilus the credit they deserve.

567. The preliminary constitutions of Justinian, relating to the composition and to the promulgation of his laws, mention as having taken part in their elaboration three other professors: 1st. Dorotheus, of the school of Berytus, who worked at the Digest, the Institutes and the 2nd edition of the Code—the constitutions say of him, that it was in consequence of the great reputation which he enjoyed at Berytus and the fame that he had acquired that the emperor summoned him to take part in his work; 2nd. Anatolius, also a professor of Berytus; and

3rd. Cratinus, a professor at Constantinople, who, however, only assisted in the preparation of the Digest.

568. We must not omit to notice the great dignity which attached to the office of public professor of law (*Professor legitimæ scientiæ constitutus, Juris interpres constitutus, Antecessor, Magister, Legum vel Juris doctor, Leges discipulis tradens, Optimam legum gubernationem extendens*). All four occupied among the nobility of the Lower Empire the elevated rank of *Illustres*. In the composition of the first Code, A.D. 528, Theophilus only appears as *clarissimus*: after this, however, he always appears with the higher title of *vir illustris*. He had been a knight of the sacred *consistorium*. Dorotheus was a quæstor, and Cratinus was a knight, *comes sacrarum largitionum*. We need not pause to enumerate the epithets *laudabilis, optimus, facundissimus, magnificus, magnificentissimus*, and the other complimentary titles heaped upon them by oriental usage.

569. As their successor in the school of law at Constantinople Julian distinguished himself as the author of the abridgment of the *Novellæ* in Latin which we possess.

The mention of these professors leads us to say a few words upon the subject of legal education.



SECTION CXIV.

THE TEACHING OF LAW BEFORE AND AFTER JUSTINIAN.

570. A.D. 533. On the same day that Justinian promulgated the Digest by two constitutions, in Latin and Greek, which were addressed to the senate and to the entire nation, he addressed a third to eight professors of the law of the empire, who were individually mentioned, with the view of indicating the course that they should thenceforth pursue in their instructions.

571. Legal education had undergone various changes. We have described its character as connected with the great jurists of the republic. It then depended on the diligence of the pupils who attached themselves to a jurist as their master, and who derived instruction by imitating the example of their preceptor. These practical lessons were, when necessity required it, accompanied with explanation; in fact the course pursued was somewhat similar to that of medical students of our day, who accompany and observe the practice of a great surgeon, or to that of a young artist who patiently watches, in the studio of his master, his mode of operation. In due course the habit of lecturing, which practice had become prevalent by the time of Cicero, was supplemented. And in this way theory and practice had, to a greater or less extent, become united. The teaching of Tiberius Coruncanius and others is described by Pomponius.¹ It is when speaking of this instruction that Cicero observes, "*Jus civile semper pulchrum fuit docere; hominumque clarissimorum discipulis floruerunt domus.*" At the beginning of the empire, still adhering to this practice of combining theoretical and practical instruction, they laid greater stress upon teaching and upon the reading of legal works, which by this time had greatly multiplied. This was the method of Labeo's system of instruction, who divided his time between literary labours and study in the country, and reading with the *studiosi* in town. These *studiosi* were advanced students, as distinguished from another class, the *auditores*, and were, in fact, already in practice, but under the direction of their master, answering to the *stagiaires*, or law students, of France. The system of Sabinus was also on this model.

When Pomponius said concerning this jurist that, not having pecuniary resources of his own, he was chiefly supported by his *auditores*,² it must not be understood as indicating that he was paid any common school fees, but that the sums given to him were marks of respect tendered by appreciating pupils to an eminent and esteemed professor. At the time of Paul, Ulpian

¹ Dig. 1, 2, *De orig. jur.*, 2, § 40 to 47.

² Dig. 1, 2, *De orig. jur.*, 2, § 47, f.

Pomp.: "Huic nec amplæ facultates fuerunt, sed plurimum a suis auditoribus sustentatus est."

and Modestinus, this method of initiation into legal mysteries, to which such men as Papinian had given great *éclat*, was drawing to a close, inasmuch as the series of classical jurists was entirely at an end. Ulpian, who designates Modestinus *studiosus meus*, is perhaps the last example of any importance; but at a given period, not precisely known to us, men commenced the profession of law in the same way as that of philosophy and literature. This profession was free and private, both in Rome and in other parts of the empire, and we find from a fragment of Modestinus that he secured for the professors of law at Rome (*legum doctores*) exemption from the burdens of tutorship and curatorship.¹ The honourable character of this profession is duly estimated by Ulpian, who refused to allow professors, *juris civilis professoribus*, access ordinary or extraordinary to the prætor for the recovery of the *honorarium* which was due to them from their pupils, upon the ground that the science of civil law was too sacred a thing to suffer from being estimated or dishonoured by money payment, and that remuneration might be honourably accepted, but that it could not be demanded.² It was to this private instruction that the *stationes jus publice docentium aut respondentium* belonged,—a species of classes for the teaching of law or for consultation (the word was also employed to signify “shops”),³ to which Aulus Gellius refers in the time of Antoninus Pius, which existed in certain numbers at Rome, and where the discussion was being carried on in all of them, at the time of which Aulus Gellius was speaking, upon the question raised by a recent event, whether a quæstor could be summoned *in jus* before the prætor.⁴ At a later period, in the Lower Empire, a system of public instruction, independent of private instruction, came into vogue, that is to say, a system of

¹ Dig. 27, 1, *De excus.*, 6, § 12, f. Modest.

² Dig. 50, 13, *De extraord. cognit.*, 1, § 5: “Proinde ne juris quidem civilis professoribus jus dicent: est quidem res sanctissima civilis sapientia: sed quæ pretio nummario non sit æstimanda, nec deshonestanda, dum in judicio honor petitur, qui in ingressu sacramenti offerri debuit: quædam enim, tametsi honeste accipiantur, inhoneste tamen petuntur.”

³ Dig. 42, 4, *Quib. ex caus. in poss.*, 7, § 13, f. Ulp.: “In foro . . . circa columnas aut stationes se occultet.” 47, 10, *De injur.*, 17, § 7: “Ad stationem vel tabernam.”

⁴ Aul. Gell. xiii. 13: “Quæsitum esse memini in plerisque Romæ stationibus jus publice docentium aut respondentium, an quæstor Populi Romani ad prætorem in jus vocari posset.” Aulus Gellius clenches the question by a passage from Varro.

authorized public instruction. It is more than probable that Rome had one of these schools before they were established in Constantinople, in which studies, which the Romans called liberal studies, were conducted; but we do not possess any documentary evidence as to the organization of this school, nor as to the various branches of study pursued in it. We only find in the Theodosian Code, under the title *De studiis liberalibus urbis Romæ et Constantinopolitanæ*, A.D. 370, a constitution of the emperors Valentinian I., Valens and Gratian, concerning the discipline to be observed by the students; in which, after enjoining on the students to be punctual at their classes, to take care not to acquire a character in anyway disgraceful or disreputable, to avoid associates of questionable reputation, it proceeds to forbid the too frequent resort to places of amusement and taking part in boisterous banquets; and adds, that those amongst them who do not conduct themselves with the propriety that a liberal profession demands shall be publicly scourged, banished the town, and sent back to their homes.¹

This constitution does not appear in the Code of Justinian, in which we only find one that was issued fifty-five years afterwards, A.D. 425, by Theodosius II. and Valentinian III., regulating the organization of the public school at Constantinople, with its thirty-one professors, two of whom were professors of law.

572. At the time of the promulgation of the Digest, the second edition of the Code, and the first fifty or sixty *Novellæ*, Rome was in the hands of the Ostrogoths; it was not till 537 that the keys of that city were carried to Constantinople, nor till 554 that Italy was reconquered by Justinian; but we know that the emperors of the East acted towards those portions of the empire which were occupied by the invading Germans, and especially towards Rome, as is the habit with fallen princes, who will not look upon facts as they are, and regard lost rights as if still subsisting. Thus in the laws of Justinian, especially in

¹ Cod. Theod. 14, 9, *De stud. liber.*, 1, const. Valent., Valens and Grat., A.D. 370,

those which refer to liberal studies, and in the constitution addressed by Justinian to the professors of law throughout the empire, Rome continues to be mentioned as if it was still the *Urbs regia*, whose institutions and privileges served as the type of those of Constantinople. In reality the constitution of A.D. 533, at the moment at which it was promulgated, only actually affected the schools of the East, viz., those of Constantinople and Berytus. The allusion to Rome was merely nominal, and introduced to maintain the imperial pretensions, and in anticipation of a future, and the eight professors of law who are mentioned all belonged to the schools of Constantinople and Berytus.¹ Of these eight professors, seven were *illustres*, the eighth was simply styled *vir disertissimus*.

573. In order to gather more accurately the details of this constitution concerning instruction in legal matters, both anterior and posterior to its promulgation, we shall follow our usual system of analysis.

“To the professors (*Antecessoribus*), Theophilus, Dorotheus, Theodosius, Isodorus, Anatolius, Thalleleonius, Cratinus, *Illustres*, and Salaminus *vir disertissimus*, greeting:”

Pr. “None know better than you that all the law of our republic has been revised and classified in the four books of the Institutes or Elements, the fifty books of the Digest or Pandects, and the twelve books of the Imperial Constitutions. We have already published both in Greek and Latin the necessary constitutions, both to order the preparation of these works and to give them publicity. We now address you and your successors, professors of the science of the law, who shall be rightly so constituted (*et omnes postea professores legitimæ scientiæ constituti*), in order briefly to note the ancient practice

¹ The number eight is double the recognized number of professors of law. It must not be supposed that the number was increased permanently, because in the next year, A.D. 534, we find the recognized number two for each school. The explanation most probably is, that during the compilation of Justinian's

works, the four professors, Theophilus, Dorotheus, Anatolius and Cratinus, being withdrawn from their ordinary duties for that period (*in nostro palatio introductis;—ad nos deduximus*), others were temporarily appointed to fill their place.

as to legal instruction, and to point out the course to be followed in the future.

“ § I. You know that of the immense mass of law contained in two thousand works (3,000,000 lines), the professors have hitherto confined themselves to six works, these being themselves confused, containing much useless matter; the others being either obsolete, or not procurable by all.

“ The first year’s course included the Institutes of Gaius and four special books: the first upon the ancient *res uxoria*; the second upon tutelage; the third and fourth upon wills and legacies. The whole of these were not to be read, many parts being superfluous. The order of the perpetual Edict was not followed, but pieces were selected here and there, the useful being mixed with the useless, the useless being in excess.

“ The second year’s course, following an order which deserves to be called preposterous, because this immediately followed the Institutes, included instruction in the first part of the law (according to the Edict), with the exception of certain titles, not continuous but partial, and containing much that is useless. Then followed other titles, including portions of the law which treat *De judiciis* (a small fraction only, the whole volume almost having become obsolete); those which treat *De rebus*, seven books, having been discarded either because they were inaccessible to students or unfit or not proper subjects of instruction.

“ During the third year the course of instruction embraced those subjects which had not been explained to the students in the first years in either work *De rebus* or *De judiciis*, after which the pupils were introduced to the glorious Papinian and his *responsa*. Of the nineteen books of which these *responsa* are composed, eight only were used as subjects of instruction, and these only partially.

“ The fourth year’s course included instruction in subjects already detailed. The students repeated the *responsa* of Paul, not, indeed, in a complete form, but in an extremely disconnected manner, no order whatever being observed.

“ Thus, in four years, the whole of the ancient learning was exhausted; and if we calculate, we shall find that of this im-

mense quantity of laws, in all three million lines, scarcely six thousand were introduced to the notice of the student.

“§ II. The miserable deficiency of this system has been apparent to us, and we have, therefore, placed in the hands of all who desire to avail themselves of it those treasures which, when arranged by you, are calculated to make your pupils learned jurists.

“During the first year let them learn our Institutes, which have been derived from the ancient source of the old Institutes, and reduced to a simple and intelligible form by Tribonian, a man of transcendant genius, and two of your number, Theophilus and Dorotheus, illustrious professors. The remainder of the year is to be occupied with that which logically follows, viz. the first portion of the laws, called by the Greeks *πρῶτα* (preliminary books 1, 2, 3 and 4 of the Digest).

“The students are no longer to use the old, frivolous and ridiculous appellation of *Dupondii* (students of the double *as*, ironically of two sous); they will be called *Justinianani novi*. Let those who aspire to the science of law bear for the first year our name, inasmuch as the first volume of our work is placed in their hands. They heretofore have borne a name answering to the ancient confusion of laws; but since the laws have been presented to them in a clear and lucid manner, it has become necessary to exchange this name for a more honourable one.

“§ III. During the second year we sanction the use of the name *edictales*, given to them in allusion to the Edict: as students of the Edict, they shall be instructed in this, or rather in the seven books (*De judiciis*, lib. 5 to 11 of the Digest), or in eight books (*De rebus*, lib. 12 to 19 of the Digest), according to the opportunity that the professor shall have of selecting either subject, so it be done without confusion. These books, whether *De judiciis* or *De rebus*, must be explained completely and in their order, without any omission whatsoever, inasmuch as everything has been arranged in them in excellent order, and nothing will be found there that is useless or obsolete. To these let there be added four books, at discretion, taken from the fourteen relative to specialities, one of the three treating upon dower (lib. 23, 24 and 25 of the Digest); one of the two

treating upon tutelage and curatorship (lib. 26 and 27 of the Digest); one of the two upon wills (lib. 28 and 29 of the Digest); and one of the seven treating upon legacies, *fideicommissa* and their accessories (lib. 30 to 36 of the Digest); the ten remaining books of the fourteen being reserved for a convenient occasion, for it is impossible, in the second year's course, for the professor to take the whole fourteen.

“ § IV. The third year's course shall include either the books *De judiciis* or *De rebus*, according as the professor has adopted one or other in the preceding year. After this, three courses of special subjects: the book upon pledges and hypothecations (lib. 20 of the Digest); the book upon interest (lib. 22 of the Digest, *De usuris*); the book upon the Edict of the ædiles; the *actio redhibitoria*, evictions and *stipulationes dupli*; subjects which were placed in the latter part of the Edict, but which we have transposed in order that they may be more approximate to the subject of sale, with which they are intimately connected. These three books shall be taught conjointly with the reading of the most ingenious Papinian. The students shall, in their third year, learn to recite his works, in fragments, upon various subjects. As to you, the illustrious Papinian will furnish remarkable lessons, derived not merely from the nineteen books of his *responsa*, but also from the thirty-seven books of his questions, from the double volume of his definitions, from his book upon adultery, and from almost the whole of his works which are distributed throughout our Digest.

“ In order that the students in their third year, who were formerly called *Papinianists*, may not lose the name and the *fête*, the study of his works has been introduced into this third year, for we have supplemented the book upon hypothecation by the reading of the great Papinian: thus the students, rightly deriving their name of *Papinianists*, in which they rejoice, and which is to be retained, shall continue to celebrate the *fête*, to which they have been accustomed, upon their entrance upon the study of his laws, in order that the memory of the sublime Papinian, of præfectorial dignity, may endure for ever.

“ § V. During the fourth year the students shall preserve the name derived from the Greek *λύταις* (licentiates) as heretofore. In the place of the *responsa* of Paul, eighteen books out of

the twenty-three which they were in the habit of reciting in a partial and confused manner, let them learn to read frequently the ten books of the specialities out of the fourteen to which we have already referred, from which they will derive greater benefit than from the *responsa* of Paul. Thus the seventeen books which we have composed upon the specialities, forming the fourth and fifth parts of our Digest, will have been acquired by them, and from the commencement of their studies they will have learned in all thirty-six books; as to the remaining fourteen books, which constitute the sixth and seventh parts of the Digest, let them be so explained as to enable them to study them afterwards in private, and, when required, to be able to cite them in court.

“ During the fifth year, when they enjoy the name of *Prolytæ*, if after having been well grounded in the subjects already indicated, they devote themselves to the reading and thorough understanding of the constitutions contained in our Code, they will lack nothing of the science of the law.

“ § VI. Thus may they succeed in becoming great orators, satellites of justice and powerful advocates or judges—happy in all places and in all ages.

“ § VII. Instruction shall be given, as our imperial predecessors have directed, in the royal cities only (Rome and Constantinople), and at the lovely city of Berytus, which indeed well merits the appellation of ‘nursery of the laws,’ but in no other place. We have been informed that in Alexandria, Cæsarea and in other cities ignorant men have imparted spurious instruction to their pupils; these we prohibit, and those who shall be so presumptuous as to constitute themselves professors of law, otherwise than in the royal cities or Berytus, shall be liable to a penalty of twenty-one pounds of gold, and to be expelled from the city, where they, instead of having taught the law, have contravened the law.”

§ VIII. continues the same provisions as in the preceding constitutions against copyists, who, in the MS. of Justinian, should use signs or abbreviations; the penalty being double the value of the work payable to any person who purchases these productions in good faith.

“ § IX. No one following the legal course shall dare, either

in this sublime city or at Berytus, to permit any unworthy tricks or other practices, the effect of which might be injurious, nor to commit any other malpractices in respect of their professors or their fellow pupils, particularly in connection with the junior pupils." (It appears that the practice of the senior students imposing on the juniors vexatious or oppressive tasks, a practice which has been kept up to our own time in many even of the best of our schools, had a very early origin.) "How is it that such disgraceful conduct can be called a game? For our part we will not tolerate it. Let the soul be first elevated, the language will follow!" (Saint Augustine, in his *Confessions* (v. 8), relates the fact of his quitting Carthage, notwithstanding the great grief of his mother, chiefly on account of the unrestrained licence of the students, whose lawless conduct would have entailed heavy punishments had they not been screened by traditional custom, and of his going to Rome, having heard that such practices were not permitted amongst the students of that city.¹ This was about the year 372, shortly after the constitution of 370 had commenced to take effect in the schools of Rome and of Constantinople.)

"§ X. The urban præfect at Constantinople, and at Berytus, the president of the Phœnician marine, the bishop and the professors of law, are charged with the observance of all these instructions.

"§ XI. Commence then to give, under the direction of God, instructions in the laws. Open up the road that we have disclosed. Make good officers of justice and of the state, and may honour attend you through all ages—you who have had the good fortune to see in your own time changes in the state of the laws equal to what is related by Homer of Glaucus and Diomede.

. " ' Gold for copper, centuries for decades.' "

" Given at Constantinople the 17th of the kalends of January, in our third consulate" (10th December, A.D. 533).

¹ S. Augustin, *Confessions*, v. 8: "Quod audiebam quietius ibi (at Rome) studere adolescentes, et ordinatio discipline coertione sedari . . . Contra apud Carthaginem foeda est et intem-

perans licentia scholasticorum . . . Multa injuriosa faciunt, mira hebetudine, et puniendi legibus, nisi consuetudo patrona sit."

574. The tenth paragraph of this constitution shows us, both by its contents and by the mention of the magistrates charged with the execution of the duty, that two schools only, viz. those of Constantinople and Berytus, were recognized. Rome at this time was in the hands of the Ostrogoths, and is only incidentally referred to. A public school, however, had been maintained there by a foreigner, Cassiodorus, who, as minister and favourite of Theodoric, had assisted this conqueror in the preservation of Roman civilization in Italy, and who, during the minority of his successor and grandson, Atalaric, had retained the same functions. Amongst many other works, he has left a collection of letters, in which we find a large number of minutes and rules concerning the administration. He relates, that towards the end of the reign of Atalaric, who died A.D. 534, an ordinance was promulgated relating to this school at Rome (*schola liberalium litterarum*), in which are mentioned, in addition to the professors of grammar and rhetoric (*grammaticus—grammaticorum schola; orator—doctores eloquentiæ*), those of jurisprudence (*nec non et juris expositor*);¹ and, finally, we find twenty years later, A.D. 554, at the period when Italy was reconquered, Justinian preserving to these professors of Rome (*grammaticis ac oratoribus, vel etiam medicis, vel jurisperitis*), the privileges conceded them by Theodoric (*quam et Theodoricus dare solitus erat*).²

With this change of rule a corresponding change in the instruction given in the public school at Rome became necessary. Whereas those texts hitherto used were compiled from the works of the classical jurists of Rome sanctioned by the *lex de responsis*, the codes of Gregorian, of Hermogenian, of Theodosius, and the *Novellæ* subsequent to this Code, to which were doubtless added the compilations contained in the edict of Theo-

¹ Cassiodorus, *Var.*, ix. 21.

² The pragmatic sanction of Justinian which has been transmitted to us in an analysis of the Epitome of Julian, and which appears in the editions of the *Corpus juris* after the *Novellæ* of Tiberius, ch. 22: "Annonam etiam, quam et Theodoricus dare solitus erat, et nos etiam Romanis indulimus, in

posterum etiam dari præcipimus: sicut etiam annonas, quæ grammaticis ac oratoribus, vel etiam medicis, vel jurisperitis antea dari solitum erat, et in posterum suam professionem scilicet exercentibus erogari præcipimus, quatenus juvenes liberalibus studiis eruditi per nostram Rempublicam floreat (A.D. 554)."

doric—whereas instruction, based upon these texts, was in all probability given as described by Justinian in the period anterior to his own—with his accession it became necessary to add or to substitute the Institutes, the Digest and the second edition of the Code, the promulgation of which he had ordered to be made in Italy, and to be taught in the order prescribed by the constitution of A.D. 533, relating to the reformed method of giving legal instruction. And, finally, we have introduced the law of the *Novellæ* and the Epitome of Julian, which appeared at a later date, either during the life or shortly after the death of Justinian. This Epitome was a Latin abridgment of the *Novellæ*, which constituted a portion of the instruction given in the schools, and which was widely circulated throughout Italy.

575. We have now arrived at the point which serves as a limit to this work. Our labours must end with the legislative measures of Justinian, and all that remains to us is to cast a final glance at the institutions of the empire, in order to realize in their entirety the changes which have been wrought since the time of Constantine.

GENERAL SURVEY OF THE PRECEDING PERIOD.

THE EXTERNAL SITUATION OF CONSTANTINOPLE.

576. This title sufficiently indicates that the nations which had gathered upon the frontiers of the empire, menacing its provinces with invasion, had achieved their work. It recalls to our mind the migration of Constantine with his court to a new capital, and the division of the Roman people into two empires; the hordes of barbarians crowding from the north to the south, and the disappearance of the Western Empire.

Under the reign of Justinian the victorious arms of Belisarius and Narses for awhile reconquered the shores of Africa, Sicily, and Italy. That which was the republic of Rome was now the exarchate of Ravenna.

The Bulgarians, the Persians, the Avars, and tribes emanating

from Thrace, had descended upon the Eastern Empire. Belisarius, time after time, had repulsed them, but his victories had no permanent effect. The surrounding nations, among whom were some who received tribute from the Emperor of Constantinople, were ever ready to make fresh invasions.

THE JUS PUBLICUM.

577. The emperor was paramount, the people and the army powerless.

The *patricii*, the bishops, the urban præfect, the prætorian præfect, the quæstor of the sacred palace, the officers of the household, the knights of the consistorium, all *illustres, spectabiles* or *clarissimi*, formed the imperial cortège. These officials were simply, all of them, his most submissive subjects. The senate was reduced to a species of tribunal, the consulate to a mere date; for from his palace the Emperor declared war or dictated the terms of peace, levied taxes, promulgated laws, appointed or deposed magistrates, condemned or pardoned his subjects. The legislative department of the empire, the judicial, the executive, were all in his hands.

There was no will save that of the prince, and the *corpus juris* published by Justinian is but a collection of ancient laws modified to suit the imperial whim.

There was no justice except that which was rendered or caused to be rendered by the prince. The number of prætors was reduced to three, and their power was eclipsed by that of the urban præfect, the prætorian præfect, and numerous other officers.

578. CRIMINAL MATTERS.—A *lex*, or a *plebiscitum*, no longer served, as in the time of the republic, as the basis of an accusation. The prosecutor caused his charge to be written in the presence of a magistrate; at Constantinople before one of the superior officers, according to the nature of the offence, and in the provinces before the rector, the president or the præfect of the provincial prætorium. This magistrate constituted the tribunal, and investigated the case. The senate took cognizance of certain cases, the emperor himself of a great number.

579. CIVIL MATTERS.—From the time of Diocletian, and especially after the constitution of Constantius, after that of Theodosius and of Valentinian, solemn judicial formulæ were dispensed with, even by way of fiction, and there no longer existed any necessity to solicit the *actio* from the prætors (*impetrare actionem*); the separation between the *jus* and the *judicium* was no longer observed, and all trials were now *extraordinaria*, that is to say, in every case the magistrate himself tried and determined the case. The plaintiff presented himself before him; the proceeding commenced by the allegation of his claim and the assertion of his right (*editio*). After a certain delay came the *in jus vocare*, and the case was argued by the advocates (*causidici, togati, advocati*), and the judge decided it by the evidence submitted to him. He also looked after the execution of his judgment. In this way he united in himself all the powers which were previously distinct—*jurisdictio, imperium, judicium*.

580. The system of administration outside the limits of the capital was entirely that established by Constantine. The præfectures were divided into dioceses, and the dioceses into provinces, which were under the direction of præfects, vicars, rectors and presidents. The bishops wielded great authority: but each city had, in addition, its decurions and its municipal magistrates: the office of the *Defensores civis* had fallen into discredit, and Justinian, in one of his *Novellæ*, endeavoured to replace it on its former basis. It is to this tribunal that matters of minor importance were referred.

THE JUS SACRUM.

581. The profession of Christianity had been at one time a crime which was punished by the emperors; at the period of which we are now treating it was paganism which was proscribed, and all who did not profess orthodox opinions were liable to severe penalties. They constituted, indeed, a reprobated class, and Christians believed themselves contaminated by contact with an apostate, a heretic, a Jew or a pagan, words which have descended to us as synonymous with infamy.

In its principles and its code of morality, the religion of Christ is superior to temporal dominion, from which it endeavoured to detach itself, but forgetting its characteristics so worthy of the Deity, its priests and bishops approximated it as closely as possible to earthly power. Bishops were elected by the suffrage of the faithful, and were numbered among the chief magistrates of the empire, and to their spiritual functions were added extensive civil powers.

The Church was enriched by the gifts of emperors and their subjects: it saw its wealth increase day by day. Convents for women and monasteries for men were multiplied. Orders of monks spread in every direction. Theological controversy however continued to rage with bitterness, and councils were from time to time held to determine disputes which can never be adjusted.

THE JUS PRIVATUM.

582. Born with Rome itself, inscribed upon the Twelve Tables, the primitive civil law of the Romans preserved its character and all its republican severity until the subjection of Italy. The principles of the *jus gentium* and the decisions of the prætors, together modified the system, and it may be said to have ceased to exist with the fall of the republic. The efforts of legislation were then directed to an entirely different end,—natural justice and equity. The succeeding age brought with it superior genius, and distinguished jurists succeeded one another as if they had borne to each other the relation of father and son, and by their writings they converted jurisprudence into a splendid science. It is a curious study to follow the history of original Roman law, which fell with the republic, through its various vicissitudes, and to trace it to its destiny. At first its principles were in all points in direct contrast with the new institutions, which were only introduced by the aid of ingenious subtleties; imperial constitutions constantly assailed the ancient *régime*, and the change of the capital denationalized it; from this moment we find old institutions disappearing day by day, those which remain being less in harmony with the prevailing manners. Finally, Justinian published an entire body

of jurisprudence, and at once swept away the greater part of the subtleties and excrescences still existing, leaving little beyond traces of primitive legislation, and finished by annihilating by one of his *Novellæ* one of the most remarkable of Roman institutions,—the civil composition of the *familia* and the rights which belonged to it.

583. PERSONS.—The law now favoured enfranchisement; all the enfranchised were citizens, and the difference heretofore existing between them and the *ingenui* was gone. The men belonging to a special class, a species of serf, formed a link between slavery and freedom. Marital power (*manus*) no longer gave the right to sell a free man or to abandon him to another; *mancipum* had disappeared; the paternal power had lost nearly all authority except what it derives from nature; the son had an individuality which became more and more complete; he was the proprietor of various kinds of property over which his father had no control; the civil composition of families, the difference between civic relationship (*agnatio*) and blood relationship (*cognatio*) but little affected the rights of individuals; and Justinian, by one of his *Novellæ*, almost wholly effaced the distinction.

584. THINGS AND PROPERTY.—There was no longer any distinction between *res Mancipi* and *res nec Mancipi*; consequently *mancipatio* or other solemn formalities were no longer necessary for the transfer of property. There was no longer any difference between Italian and provincial property; there was but one kind—natural property, or that which springs from common right.

585. WILLS.—The solemn and fictitious sale of the inheritance was gone. Testamentary dispositions had become simplified. The son, as well as the head of a family, might by will dispose of much that he possessed; and the restrictions once placed upon the capacity to receive testamentary bequests in the case of *cælibes* and *orbi* had been removed.

586. SUCCESSION.—The Institutes of Justinian gave to natural relations the ordinary rights of succession; and by the *Novellæ* of the same emperor the distinction between the *agnati* and the *cognati* being suppressed, an order of succession was established in which no vestige of the ancient idea is to be traced, and which is based solely upon the ties of blood.

587. CONTRACTS.—Contracts having been modified during the preceding period, underwent little change in this. The provisions of the prætor, which rendered many agreements obligatory which were not sanctioned by the civil law, became a portion of the legal Code of Justinian. Symbolic words were no longer necessary in stipulations, and it sufficed that the question and answer corresponded. It became the general practice to negotiate by the instrumentality of persons clothed with a certain public character, and who were styled *Tabeliones*.

588. ACTIONES.—All the characteristics of the ancient *actio* had disappeared. There were no longer any symbolic forms as in the *actiones legis*. No demand for the formula intended as a species of instruction for the judge, which had been the characteristic of the formulary system, was any longer necessary, nor was any notice of action. At this period, the word *actio* simply meant the right to take legal measures to enforce a claim, or the act of so doing.

MANNERS AND CUSTOMS.

589. Throughout the State, in the magistracies, and even in families, we in vain seek Roman manners,—we find those of Constantinople.

In the State, that which occupied the public mind was neither liberty, nor public good, nor the success of the national arms; it was the colour of a rider, or a religious dogma.

If we look at the magistracies we no longer see them the object of ambition, as affording an opportunity of contributing to the public weal, or offering honourable posts to citizens; but

we find place regarded as a means and sought after for the purpose of gratifying ambition and of amassing wealth.

The close bond of union between the members of a family is gone: the internal discipline, and the submission to the will of the chief, no longer exist, a striking contrast with the condition of the *familia* under the republic, when the head of the family, as the owner of its property, and the proprietor of the persons that constituted it, had absolute power. Each family then formed a species of despotic little state, from the union of which sprang a great nation, free within and formidable without. Under the empire the head of the family ceased to be the proprietor either of the persons or of the property: the members were in a certain measure free, and from their union sprang a great nation, servile within, cowardly and contemptible without.

THE DESTINY OF THE ROMAN LAW IN THE EAST AND WEST

UNDER JUSTINIAN.

§ I. IN THE EAST.

SECTION CXV.

THE GREEK JURISTS OF THE SIXTH CENTURY.

590. The Eastern Empire existed about nine centuries after Justinian's death, till A.D. 1453; and excepting the *Novellæ* of his successors, his legal Code maintained its authority till about the end of the eleventh century, and finally ceased to be regarded as the governing law without any special enactment having abrogated it.

This transformation is attributable to various causes. The principal cause was the transformation which the Eastern empire itself underwent. It became more and more detached from the West, losing not only in common use, in society, in the administration of the laws, but even in the acts of the imperial officials, the last trace of the Roman language, in which Justinian saw a reminiscence of the republic (*propter reipublicæ figuram*). Notwithstanding the fact that the emperors of Constantinople preserved the title of the "great kings of the Romans,"—and notwithstanding the fact, that in the greater number of their acts (for example, in the *Novellæ* by which the emperor Theophilus Flavius, A.D. 829 to 842, authorized marriage between the Persians and his subjects), their subjects were styled "Romans,"—the Eastern empire had become exclusively Greek. It was in fact the Byzantine empire. The power of the emperor, unlimited in law, often found itself

powerless in fact. Invested with a supremacy over the Greek Church, he had more than once to settle accounts with the patriarchs and clergy of Constantinople. The science of law acquired such a character, that the practices, the controversies and the subtleties of religion had become mixed up with it, and exercised upon it a gradually increasing influence. The *Novellæ* of the later emperors were to a great extent nothing but ecclesiastical rules, and secular jurisprudence vanished by being almost totally absorbed in the ecclesiastical. In this way the collections and writings of the Greek canonists became documents of considerable importance in the study of that law which is known as Græco-Roman. As to the system of law which had been founded by the great jurists of Rome, it was no longer understood, either in the language in which it had been written or in the historical frame in which Justinian had placed it. Altogether powerless at any period of its existence to give birth to a legislation, or to create a code in conformity with its necessities, the Greek empire continued, so to speak, to live upon the legislation of Justinian, which it left to be transformed by translation, by the practice of the period and the jurisprudence of the time. In this way the works of Justinian preserved for five hundred years after his death a nominal authority, and even after this period they appear as the basis of the forms and new decisions by which they were definitively replaced.

591. The first phase of this transformation commenced even in the time of Justinian, and continued during the remainder of the sixth century into the commencement of the seventh, that is to say, during a period of about fifty years after the death of the imperial legislator. This phase was the practice of literal or epitomized translations, summaries or logical tables (*indices, paratitla*), or annotations and tables of reference and concordance—three kinds of works specially authorized by Justinian himself. But there were also interpretations, commentaries more or less extended, abridgments or epitomes which had been prohibited by Justinian, but which prohibition was even in his own time a dead letter. All these were written in Greek, and all Latin forms and expressions were discarded.

Amongst the authors who figure in this first phase, we find the names of jurists who were for the most part professors of law, and with whom we have already become acquainted. Three of these had taken part in the work of Justinian—Theophilus, Dorotheus and Anatolius, the two former having predeceased the emperor. Two of them, to whom independently of the three already mentioned, Justinian had addressed his constitution of A.D. 533 relative to legal instruction, were Isidorus and Thalleleo; and there were five others who, notwithstanding the fact of their not being mentioned, nevertheless lived and wrote during the time of Justinian: Stephen, a professor of law at Berytus in A.D. 555; Julian, celebrated for his *Epitome Novellarum*, published A.D. 556, according to others in A.D. 570, and who is described in various manuscript copies of this work as professor of law in Constantinople. There was another writer, who is quoted under the mysterious appellation of Anonymous, but who, if we can rely upon the conjectures of Biener and C. Zachariæ, was the same as Julian; another was Athanasius, an advocate and jurist of renown at Antioch and Assyria; and, finally, there was the canonist John of Antioch, surnamed “Scholasticus,” to whom we have already referred. He had commenced his career as an advocate, and having afterwards taken orders became a priest at Antioch, and was elevated by Justinian in A.D. 565 to the dignity of patriarch of Constantinople. This school, which may be termed the school of Justinian, was continued by a series of writers posterior to that emperor, but belonging to the sixth century and the commencement of the seventh: Cyrill, Theodorus of Hermopolis, Gobidas or Cubidius, Phocas, Anastasius, Philoxenes and Symbatius, who undertook the transformation and interpretation of the great legislative work into Greek, adapted to the practice of their own time. With the exception of three or four works which we have in manuscript, the existence of the greater portion of these writers and the results of their labours are only known to us in a manner similar to that of the great Roman jurists of the classical era, that is to say, by fragments from their works collected with the title of the work and the name of the author in the imperial compila-

tions of the ninth century, principally in the *Basilicæ*, or as quoted in subsequent documents, or by writers of a later time. It is to these Greek jurists, connected with this first phase of transformation, that in later works the collective appellation of *Antiqui* has been applied. These writers studied the collections of Justinian himself, many of them having before them the pure texts of the classical period.¹

The four parts of the legislative work of Justinian formed each a portion of their labours.

1. THE INSTITUTES.—There were the paraphrased translation of the Institutes in Greek by Theophilus, which had the widest circulation and which has descended to us in various manuscripts, and two commentaries, the one by Dorotheus and the other by Stephen, with which we have become acquainted merely by the quotations.²

2. THE DIGEST.—We know of the existence of commentaries by Theophilus, Dorotheus, Isidorus, Stephen, by the anonymous writer, Cyrill, Theodorus of Hermopolis, Gobidas or Cubidius, and Anastasius, but merely by quotations.

3. THE CODE.—In the same way we know of a Greek translation, with succinct commentaries, by Anatolius; a more voluminous commentary by Isidorus; a translation, with a still more extensive commentary, by Thalleleo; two abridgments, the one by Stephen and the other by Theodorus of Hermopolis; and a new commentary by Phocas; known only by quotation.

4. THE NOVELLÆ.—We know of three abridgments or epitomes, the one by the anonymous writer, another by Athanasius,

¹ It is unnecessary to observe, that when we are reduced to mere quotations from the *Basilicæ*, or writers of more recent date, the biography of these jurists is uncertain, as also the period at which they actually lived. Reitz, who wrote during the last century, Biener, Heimbach and C. Zachariæ, who belonged to our own time, have expended great labour in endeavouring to determine certain points. We must take care not to confound Stephen, Theodorus, Phocas, now under consideration, with jurists of the same name who appeared in the constitutions of Justinian as having taken a

part in that work; nor Cyrill with the Greek of the same name, of a date prior to Justinian; nor Symbatius with the writer who appears to have directed the labours connected with the compilation of the *Basilicæ* under Leo the Philosopher.

² The edition published by Guil. Otto Reitz, *Theophili antecessoris paraphrasis græca. Hagæ comit.* 1751, 2 vols., presents a rich collection of material and much instruction concerning this paraphrase, the other labours of Theophilus, his biography, and concerning the Greek jurists his contemporaries.

and the third by Theodorus of Hermopolis. These three abridgments have descended to us in manuscript, the first however only in fragments, and by way of quotation. We must add to these certain works which have been published in our own days¹ upon the *Novellæ*, and those mentioned in § 554.² There is a great analogy between the Greek abridgment by Anonymus and the Latin epitome by Julian, which has suggested the belief that these two works were by one and the same person, and that Julian, after having published it in Latin, published it with trifling alterations in Greek. To these abridgments must be added two commentaries upon the *Novellæ*, our acquaintance with which is limited to certain quotations; one is by Philoxenes, the other by Symbatius.

Independently of these Greek works upon the collections of Justinian, the number of which, as has been seen, is considerable, we find mention of three monographs upon special subjects.

This period of activity, which was commenced by the efforts of Justinian, extended through the sixth century, and was succeeded by a period of two centuries and a-half of inaction, during which period the texts themselves were forgotten, and translations and abridgments only resorted to when necessary in practice. To such an extent was this the case, that during more than a hundred years from the time of Leo III. the Isaurian (from A.D. 717 to A.D. 741), till Michael III. and Bardas (A.D. 856 to A.D. 866), the public school at Constantinople was closed, and all public instruction abandoned. The second phase of the transformation which the law of Justinian

¹ *Athanasii Epitome Novellarum*, published by Heimbach in his *Anecdota*, vol. 1, Leips. 1838. *Anonymi Epitome Novellarum*, fragments published by C. Zachariæ in his *Anecdota*, Leips. 1843, pp. 196 to 211. *Theodori Brevarium Novellarum*, published by C. Zachariæ in his *Anecdota*, Leips. 1843, pp. 10 to 61 and 1 to 165. The manuscript is in the Imperial Library of Paris, Côté Acq., No. 15950 F.

² The *Nomocanon* of John of Antioch, to which we have referred, par. 449, has been disputed, and has

been attributed to some other unknown person, who borrowed from John of Antioch the rubric and the titles of his collection of canons in order to add extracts from the corresponding novels; we do not see, in the evidence derived by Biener from certain manuscripts, sufficient reason to warrant this supposition. Whoever may have been the author, the work itself exists, and it is ascribed to a period shortly after the death of Justinian; it holds an important though special place in the history of the *Novellæ*.

underwent was not in works published by jurists, but in official promulgations made by certain emperors.



SECTION CXVI.

THE MANUALS OR CODES OF THE BYZANTINE EMPERORS:
Ecloga, Prochiron, Epanagoge, Basilicæ.

592. The emperors to be considered under this head are Leo the Isaurian, surnamed Iconoclastes, and his son Constantine Copronymus, who reigned together for one and twenty years, from A.D. 720 to A.D. 741. Basil the Macedonian, who first alone, and afterwards in association successively with his sons Constantine, Leo the Philosopher, and Alexander, reigned nineteen years (from A.D. 867 to A.D. 886). Leo the Philosopher, who, in conjunction with his brother Alexander, and afterwards in conjunction with his son Constantine Porphyrogenitus, reigned twenty-five years, from A.D. 886 to A.D. 911.

The first, that is to say, Leo the Isaurian, with his son Constantine Copronymus, published A.D. 740 a manual of the law which is known by the name of *Ecloga legum*, sometimes also called *Enchiridium* (manual), or the Isaurian law.

The second, that is to say, Basil of Macedonia, with his sons Constantine and Leo the Philosopher, produced, a hundred and thirty years later, A.D. 870, a second imperial manual, which declared the former abrogated, and which is known under the name of *Prochiron*, sometimes also called the constitution of Basil, or the constitution of the three emperors. The prologue of the *Prochiron* announced a more extended work and adjustment or revision of the entire body of the ancient laws. This work was commenced, and several volumes were published, under these emperors. A second manual, intended as a species of introduction to this projected work, and which was a revised edition of the *Prochiron*, was published by Basil in conjunction with his sons Leo the Philosopher, and Alexander (between A.D. 879 and A.D. 886), under the title of *Epanagoge* (*repetita prælectio*).

And, finally, Leo the Philosopher continued and brought to

a successful termination the work which was partly executed by his father, and which was known as the *Repurgatio veterum legum*, or revision of the ancient laws, and which has been handed down to us under the title of the *Basilicæ*. The promulgation of this work was in all probability made at the time when Leo was associated with his brother Alexander and his son Constantine Porphyrogenitus (from A.D. 906 to A.D. 911).

The imperial promulgations to which we have referred ought to bear the names of the emperors who reigned together at the time of their publication, but for the sake of brevity and in order to indicate solely the directing emperor, the respective works are said to belong to Leo the Isaurian, to Basil of Macedonia, and to Leo the Philosopher.

593. Each of these imperial publications more or less explicitly announced in their titles or prefaces the fact that they were derived from the *Institutes*, the *Digest*, the *Code*, and the *Novellæ* of Justinian the Great, but they were in fact derived from translations, abridgments or commentaries in Greek on the texts. The actual works of Justinian, and especially those which were in Latin, being only at that period *ad honorem* and entirely neglected in practice.

The *Ecloga legum* of Leo the Isaurian, a collection of laws reduced to the form of a manual, has descended to us in various manuscripts. The one which is in the Imperial Library of Paris (Côté Acq., No. 33011 F) was published by M. C. E. Zachariæ in 1852. It consists of a preface and eighteen titles. Three jurists are mentioned as the commission for its preparation, the Quæstor Nicetas, another Nicetas and Marinus. The date of its publication corresponds with the year A.D. 740. The contents of this official manual, and the popularity which it acquired in practice, attest the low condition of jurisprudence at the date of its publication. It was under Leo the Isaurian that the school for the public instruction of law at Constantinople was closed. The official *Ecloga* passed in manuscript into the hands of the practitioners who used it, and has received from many of them, according to their necessities or tastes, additions or appendices upon various subjects, most of which are extracts from the

juridical works of the sixth century, and it is indeed from some of these appendices that we have obtained our knowledge of certain of the works of that time. These manuscripts, of which we possess several augmented in this manner by annotations, are private editions, and have received the name of *Eclogæ privatae*. The appendices are not the same in all. It is easy to recognize, however, the fact, that as a result of tradition and translation on the part of the copyists, they acquired a common characteristic. This is the only effort of jurisprudence, and it is a meagre one, which we find up to the time of Basil the Macedonian. The MS. which appears to contain the most complete appendix, and which most closely approximates to the law of Justinian, is that now in the Imperial Library of Paris (*fonds grec*, 1384), and is known by the name of *Ecloga privata aucta*. This can only be ascribed to the middle of the ninth century, shortly before the publication of Basil,—to a period when, owing to the action of the Emperor Bardas, the public instruction of law had been re-established at Constantinople. This appendix contains fifty-four additions, amongst which numbers 32, 52 and 54 are extracts from the military and maritime laws, styled the Rhodian, and from the Georgian or rural laws. An edition of this work was published at Leipsic by M. C. E. Zachariæ in 1843, in his *Anecdota*.

The *Prochiron*, or manual of the law of Basil the Macedonian, A.D. 870, has also reached us in various manuscripts. One edition was published in 1837, in Heidelburgh, by M. C. E. Zachariæ. It consists of a prologue, or preamble, and forty titles, under which are placed fragments extracted from the Greek abridgments or commentaries of Justinian, some from the *Ecloga* of Leo the Isaurian or from the imperial constitutions which had introduced certain recognized changes. We find in the preface the assertion that the *Ecloga* of Leo the Isaurian was rather a jumble than a selection of laws, and that it was an affront to the pious legislators from whom those laws had emanated, that preceding princes had rejected it, not indeed in whole, but to a great extent, and that it would be absurd to allow it to remain.

The *Epanagoge* of Basil the Macedonian (*repetita prælectio*

legis) also consists of a preamble and forty titles. It was nothing more than a republication of the *Prochiron*, with certain alterations and modifications. The date of this is between A.D. 879 and A.D. 886; it is to be found in the *Collectio juris librorum Græco-Romani ineditorum*, published at Leipsic, in 1852, by M. C. E. Zachariæ. The Emperor Basil also, in his preamble, makes an attack upon the *Ecloga* of Leo the Isaurian, and declares that he rejects and abrogates *in toto* the futilities of the Isaurian, which resulted from his hostility to the divine dogma and to his confusion of the laws. Here we see traces of the resentment against Leo the Isaurian and the princes of his family, which resulted from the war that they had waged against the worship of images.

Whereas the *Ecloga* of the Isaurian,—thus abrogated and fallen into discredit, ceased, except rarely and in certain works of the jurists, to have any authority,—the *Prochiron* and the *Epanagoge* became, both in Byzantine jurisprudence and practice, till the end of the Eastern Empire, the constant resource and chief authority of the lawyer; but the most important portion of this legislation is the *Basilicæ*.

The *Basilics* of Leo the Philosopher, the date of which is somewhat uncertain, but is usually placed between A.D. 906 and A.D. 911, did not receive this name till long after their promulgation: the original title, that adopted by Basil in conformity with the project he had conceived, was *Repurgatio veterum legum*. The name *Basilicæ*, sometimes *Basilicus*, was adopted either in honour of the memory of Basil of Macedonia, to whom the initiative of the work was due, or rather from the Greek *Βασιλικάι διατάξεις* (*imperatoriae constitutiones*).

This work is a general compilation and revision of the laws analogous to the labours of Justinian, but bearing characteristic differences. The texts used are supposed to be those of Justinian combined with the provisions of a later jurisprudence. In reality they were the Greek works upon jurisprudence of the sixth century which were laid under contribution. The *Basilicæ* consist of extracts from the translations, paraphrases, commentaries or abridgments which had been made upon the *Institutes* and which were few in number, and of those made

upon the Digest, the Code and the *Novellæ*,—of the text itself of that part of the *Novellæ* which had been promulgated in Greek and in the *Prochiron* of Basil the Macedonian. The preamble of the *Basilicæ* notices as a capital defect in the work of Justinian its division into four different parts, which must be consulted and compared in order to ascertain the rule necessary to be followed. The compilation of the *Basilicæ* professes to unite in one, by collating and placing in concordance, the scattered provisions contained in the four collections of Justinian upon each head of law. The character of this compilation bears an exceedingly remarkable feature, in that the text even of the *Basilicæ*, designated by the name of *Capitula*, sometimes *Basilicus*, with the exception of that part which is derived from the Institutes, gives the collections of Justinian surrounded by annotations, which have obtained the name of *scholia*, very similar to that found in our glossarized editions of the text of Justinian, accompanied with notes. We find in these *scholia* interpretations, examples, developments and sometimes conflicting decisions upon the text. Indeed, a striking distinction exists between these *scholia*: some are extracts from the works of the jurists of the sixth century; others are annotations made to the *Basilicæ* by jurists of later date. This distinction has been marked in Græco-Roman literature by the use of different expressions, the term *antiqua* being frequently applied to the former, and *scholia*, properly so called, to the latter; the term *antiqui* being applied to authors of the sixth century, the others being *scholiasts*, properly so called, as in the West glossators. M. Mortreuil, in his *Histoire du droit Byzantin* (v. 2, par. 121 et seq.), asserts with authority the opinion that the ancient annotations taken from the writings of the sixth century are admitted under the form of notes developing the text, and form a portion of the plan itself of the *Basilicæ*, and belonged to the original composition of these collections, and that these other *scholia* were an afterthought. It must, however, be remarked that the *Basilicæ* were not, as were the collections of Justinian, promulgated under the head of laws which abrogated the anterior legislation from which they had been derived. The legis-

lation of Justinian continued nominally as a superior legislation to which recourse must be had as to the source of law, and to which obedience must be paid upon all points which had not been overruled by later provisions. It was not an abrogation, it was a second transformation which had received imperial sanction; and we must go to the latter end of the eleventh century in order to find Justinian's legislation entirely replaced by that of the *Basilicæ*.

The *Basilicæ*, as their introduction states, were divided into six volumes, containing sixty books, each book being subdivided into various titles, with their respective rubrics. The names and the numbers of the commission appointed to superintend this official compilation are unknown, unless the name of the president was Symbatius, invested with the dignity of Protospathaire. We have not a single complete manuscript of the *Basilicæ*, and it is only by the aid of various manuscripts belonging to different periods, some containing certain books, and others others, that the attempt has been made to reconstruct the entire *Basilicæ*; and we are indebted to M. Heimbach for the most complete and learned edition, to which he devoted fourteen years of labour, from 1836 to 1850.



SECTION CXVII.

THE GREEK JURISTS POSTERIOR TO THE BASILICÆ—THE FALL OF THE EASTERN EMPIRE.

594. The impulse given by the legislative publications of Basil the Macedonian, and of his sons, encouraged private efforts which contrast with the inaction of the preceding century. This renewed activity, with the exception of certain intervals, continued down to the fall of the Eastern Empire. Greek jurisprudence had its codes, imperial transformations of the the works of Justinian; as elements the *Prochiron* and the *Epanagoge*, as developments the *Basilicæ*. The jurists wrote upon these codes either for the purpose of explaining them, in

order to indicate their effect, or to adapt them to the changes which had from time to time taken place.

Of these works we shall first consider those upon the *Basilicæ*. Independently of the *scholia antiqua* derived from those works nearest to the time of Justinian, whether these *antiqua* constituted a part of the original compilation of the *Basilicæ*, or whether they were added shortly after its promulgation, they were added and written in the margin during almost the entire course of the empire, with amendments, suppressions, or successive additions, the whole comprising annotations of various kinds, the character of which the science of bibliography has laboured to unravel. As the principal text (or *capitula*) remained unaltered, it was the movable and flexible portion, the field open to the doctrine of each jurist upon the MS. that happened to be in his possession, a *speculum* by the aid of which we are able to trace and to appreciate the progress of this doctrine. Of these annotations some have the appearance of being continuous, that is to say, carried out on the same system throughout the entire code, there being no indication of the author. Others are individually more detached, according to the tendency of the speciality of the study, or the opinions of each of those who have written, and to which the name is at times attached. If we are in a certain number of cases enabled from these *scholia antiqua* to learn the names of the jurists and the works of the sixth century, the more recent *scholia* have in like manner, but in fewer instances, revealed the names of some of the scholiasts of the eleventh and twelfth centuries. The list, however, as it has reached us is reduced to five: John Nomophylax and Calocyrrus Sextus, both probably of the eleventh century; Constantine of Nice, subsequent to these; Gregory Doxapater and Hagiotheodorus of the twelfth century. The *scholia* were, as to the *Basilicæ*, detailed annotations, which greatly increased the volume of the work. On the other hand, other efforts were directed to abridgment, and to facilitate use in practice. With this object the synopsis or abridgment of the *Basilicæ*, in alphabetical order, was composed about the middle of the tenth century by an unknown jurist. It contained notices of and

references to various texts, a species of dictionary, the use of which is thoroughly understood in our own day. The *Synopsis Basilicorum* was in universal request, and enjoyed a high reputation till the close of the empire. Various appendices or additions were from time to time made to it. We are also indebted to M. C. E. Zachariæ for an edition of it, published by him at Leipsic, in 1869. This dates about twenty years after the *Synopsis*, that is, about A.D. 1072. Michael Attaliota, under the modest title of *Πολύμα* (*opusculum de jure*), published a succinct and methodic abridgment of the *Basilicæ*; and another jurist in the thirteenth century, in order still farther to diminish the labour of the practitioner, made an abridgment of the two preceding works, alphabetically arranged and known under the name of *Μικρόν*, or *Synopsis minor*, edited by M. C. E. Zachariæ in 1857.

The imperial MSS., that is to say, the *Prochiron* and the *Epanagoge* of Basil of Macedonia, and even the *Ecloga* of Leo the Isaurian as to certain parts, have served both as texts, models and documents for analogous manuals published by private jurists:—

1st. The *Epitome legum*, in fifty titles, composed about A.D. 920, presents this feature in particular, that, having followed closely upon the promulgation of the *Basilicæ* at a period at which the works of Justinian, translated into Greek by the authors of the sixth century, had been discarded, it is drawn directly from these sources themselves and from the *Epanagoge* or from the *Prochiron*. A revision, with numerous additions, was made at a later date, towards the end of the same century, as a result of which it was placed in the same position as the *Prochiron*, whence it derived the name of *Epitome ad Prochiron mutata*.

2nd. The *Ecloga ad Prochiron mutata*, a compilation from the *Ecloga*, from the *Prochiron*, and from the *Epitome*, with additions and omissions, belonging also, in all probability, to the end of the tenth century.

3rd. The *Epanagoge aucta*, a revision of the *Epanagoge* of Basil of Macedonia, with additions derived from other sources, dating, in all probability, in the eleventh century.

4th. The *Prochiron auctum*, a revision greatly enlarged of the *Prochiron*, belonging to the commencement of the thirteenth century.¹

It is only for the sake of bearing them in mind that mention is here made of the following works:—One, known under the name of Πείρα (*Experientia Romani*), is a collection, in seventy-five titles, of various cases, together with their decisions, extracted from treatises and from the *Sententiæ* of the jurist Eustathius Romanus; another is the *Synopsis legum* of Michael Constantine Psellus in 1406, iambic and political verses dedicated by the author to the Emperor Cæsar Michael Ducas, his pupil, didactic verses totally devoid of poetry. These two works belonged to the eleventh century. The monk Matthew Blastares, with his *Manual of the Civil and Canon Law*, drawn up in alphabetical order and published A.D. 1335, and Constantine Harmenopulus, judge of Thessalonica, with his *Hexabiblon* or *Promptuarium*, published A.D. 1345, are the two last legal writers of the Eastern Empire whose works attained credit and became classic legal manuals of the law of the last century of the empire. The *Hexabiblon* of Harmenopulus especially, being the most recent and lucid exposition of Greek law in use at this later period, found its way through the whole of the East. Its authority is recognized by the Greeks under Turkish rule, and it was received at an early date in this character in the West. It is a methodical composition, derived from the *Prochiron*, the *Synopsis Basilicorum major* and the *Synopsis minor*, from the Πείρα, and even on certain points from the *Ecloga* of Leo the Isaurian, the whole being adapted to the condition of jurisprudence at the time when it was compiled.

Amongst those Greek jurists to whose works we have referred, many of them were equally learned writers upon ecclesiastical law, which was in very many respects allied with the civil law of the Eastern Empire. Amongst these are Psellus, Doxapater and Blastares. All the works upon canonical jurisprudence, but particularly the great collections named *Nomocanons*, a title which designated those collections which contrasted the

¹ See the *Jus Græco-Romanum* of M. Zachariæ, Leipsic, 1857.

civil and the canonical laws, or the abridgments of those collections, or the methodical treatises (*syntagma*) which have been constructed from them, merit some attention on the part of the student of the history of Græco-Roman law. Amongst these writers we also meet with Photius, the tutor of Leo the Philosopher, who published the *Basilicæ*. After the collection of the canons, and the *Nomocanon* of John of Antioch, which belonged to the period of Justinian, Photius, A.D. 883, published under Basil of Macedonia his *Nomocanon*, which was nothing but a revised edition of the preceding, with certain additions. The two remaining most illustrious writers of this class are John Zonaras, who wrote at the commencement of the eleventh century in the convent of Mount Athos, and Theodorus Balsamon, who died in the early part of the thirteenth century. We must add to these various sources of the history of Græco-Roman law the series of *Novellæ* promulgated after Justinian by the Byzantine emperors, which, for the most part, referred to political or religious matters rather than to private civil law. M. C. E. Zachariæ has published an edition of these, which he has collected, analyzed, chronologically arranged, and divided into five parts.¹

We thus find ourselves in the last stage of the Empire of the East. The Latins of the second crusade took possession of Constantinople A.D. 1204, and there founded a Frank empire, which however only lasted fifty-seven years. Recaptured A.D. 1261 by the troops of Michael Palæologus, that which has been called the Second Greek Empire commenced. From the end of the fourteenth century, the enemy destined to destroy this empire—the Turks—had invaded its frontiers, reduced province after province, and narrowed the circle by which the capital was surrounded, and eventually took it by assault. Constantine Palæologus, the last emperor of the East, died in defence of the breach, and the Eastern Empire finally fell under the sword of Mahomed the Second, in A.D. 1453. The *Prochiron*, the *Basilicæ*, and all the works of a legal character of which we have made mention, were replaced by the Koran. These works

¹ *Jus Græco Romanum*, Leipsic, 1857.

however continued to be the traditional law peculiar to the Greeks which the conqueror left to the vanquished, and in this condition have they remained even to our own day; and, notwithstanding the changes introduced by the flux of time, they have survived as the historic element and the principal basis of Greek civil law.

SECTION CXVIII.

BYZANTINE LAW SUBSEQUENT TO THE SIXTEENTH CENTURY.

595. The Greeks who expatriated themselves after the capture of Constantinople, in order to avoid the Turkish rule, carried to the west, and especially into Italy, numerous relics of Byzantine art, literature and law, which were thus saved from the general wreck. The instruction given by these exiles created a taste for the Greek language, and extended the knowledge of eastern affairs. The two Lascaris are conspicuous: Constantine, who quitted Constantinople two years before its fall, and John, who left it two years after. We know how John Lascaris, after having enriched the library of Medici at Florence with valuable MSS., in order to obtain which he risked two journies to Greece, was summoned by Charles the Eighth to France, employed by Louis the Twelfth in negotiations with Venice, and charged by Francis the First with the formation of the library of Fontainebleau, from which many of the MSS. now in the imperial library were obtained. Naples, Venice, Rome, Florence, and other cities, at that time received, either in parchment rolls or volumes, various copies of the works upon Græco-Roman law; a certain number, by purchase or gift, found their way into Germany, France, and England, while the monastery of Mount Athos, certain libraries at Constantinople, and other dépôts, continued in possession of many of these treasures, which have subsequently been overlooked or lost.

Thus before the impulse given by Cujas to the study of the manuscripts of Byzantine law, the Greek paraphrase of the Institutes made by Theophilus had been published at Basle in

1534, and the *Hexabiblon* or Manual of Harmenopulus, at Paris, in 1540. Various editions of these two works, with Latin translations, have appeared subsequently. The Latin title of the latter work, by which it was generally known, was *Promptuarium*.

The publication of the *Synopsis Basilicorum* in 1575, that of the *Basilicæ*, first with certain titles only, afterwards in the great edition of Fabrot, the first portions of which were published in 1667; that of the various collection containing the texts of the Græco-Roman law, whether canon or civil, A.D. 1573 and A.D. 1596; that of the writers of Byzantine history, beginning A.D. 1647, of the canon and the *Nomocanons*, beginning A.D. 1661, bear witness to the activity of the sixteenth and seventeenth centuries in this branch of study. These editions were for the most part accompanied by Latin translations. The names most conspicuous in this period of activity are Zuichem, Snallemborg, Bonefoi, Leunclavius, Marquard, Freher, Ch. Labbe, Suares, Fabrot, Voët and Justel.

This activity declined in France even before the revolution of 1789, and passed into Germany, where certain efforts have been made, commencing from the early part of this century by Puhl (1804), Haubold (1818), and where, at a later period, the splendid and interesting publications of Biener (from 1824 to 1833), of Heimbach (1825 to 1851), of Ch. Witte (1826 to 1840), of Bekk (from 1826), and C. E. Zachariæ (from 1836 to our own time), have appeared. It is only necessary to cast the eye over the notes attached to our previous pages, to see that there is not a relic of Byzantine law, be its importance great or small, which the German writers have not sought out, noted, compared with the manuscripts, and in the greater number of instances given new editions far superior to any which preceded them. M. Mortreuil, an advocate at Marseilles, published between 1843 and 1846 an exceedingly interesting work (in three volumes) upon the history and sources of Byzantine law.

I do not attach great importance to the study of this subject as likely to assist us much in re-constructing certain texts of the law of Justinian. Its principal source of interest is historical, as enabling us to see how the jurists of the sixth century,

several of whom were contemporaries of Justinian, interpreted the texts after the death of that emperor, and then to mark how these laws were modified during the course of the nine centuries during which the Eastern Empire lasted, and finally the kind of law which resulted from these modifications. In this view, the really useful conclusions to be derived from so much labour and so many publications appears to me to be contained in works like that produced by M. C. E. Zachariæ. No one was better able than he to draw the picture which he has given us of the internal history and methodical arrangement of Græco-Roman law. His work, which was published in three volumes successively in 1856, 1858 and 1864, is restricted to private law.

If M. Zachariæ accomplishes his project of dealing in like manner with the subject of public law, he will greatly enhance the value of his work.



§ II. THE WEST.



SECTION CXIX.

THE PUBLICATION OF THE LAW OF JUSTINIAN IN ITALY.

596. As soon as Italy, as a result of the victories of Belisarius and Narses, had become subject to Justinian, he hastened to secure the publication of, and to establish both in the courts and in the schools of Rome, his code of laws. Julian gave us a *résumé*, in his abridgment of the *Novellæ*, of a pragmatic sanction of the emperor, bearing date A.D. 554, by which this publication was authorized in Italy. It includes the *Novellæ* in order that the unity of the republic, as it says, being achieved by the aid of God, its legislation may be extended through the whole territory (*ut unâ, Deo volente, factâ Republicâ, Legum etiam nostrarum ubique prolatetur auctoritas*¹). Thus, by the efforts of Narses, who was

¹ *Pragmatica sanctio* (towards the end of the *Corpus juris*, after the *Novellæ* of Tiberius), ch. 11: "Jura in super, vel Leges Codicibus nostris insertas, quas jam sub edictali programme in Italiam dudum misimus, obtinero sancimus: sed et eas, quas postea

promulgavimus Constitutiones, jubemus sub edictali propositione vulgari ex eo tempore, quo sub edictali programme evulgatæ fuerint, etiam per partes Italiam obtinere, ut una, Deo volente, facta Republica, Legum etiam nostrarum ubique prolatetur auctoritas."

the first imperial lieutenant in Italy, under the title of "Ἐξαρχος, the official MSS. of the Institutes, the Digest, the Code and the *Novellæ* of Justinian were forwarded to and deposited at Rome. A Latin translation of those *Novellæ* which had been published in Greek must necessarily have been made upon this occasion, and in all probability a copy of these works was forwarded to each governor or duke, who was nominated by the Exarch throughout the empire.¹ In this way the legislation of Justinian would find its way into the various parts of Italy. The edict of Theodoric would thus have enjoyed, throughout Italy, the short existence of half a century.

SECTION CXX.

THE MAINTENANCE OF THE LAW OF JUSTINIAN AFTER THE FALL OF THE BYZANTINE POWER IN ITALY—THE EXTENT OF THIS POWER—THE ROMAN NATIONALITY OF THE POPULATION.

597. The conquests of the generals of Justinian in the West were not of long duration. Even in A.D. 568, that is, fourteen years after this pragmatic sanction and scarcely three years after the death of Justinian, the Lombards took from the Greek Empire a considerable portion of Italy. The extent of territory, however, and the condition of the cities which remained attached to the Eastern Empire, and the time during which this connection continued, require a passing notice.

Ravenna, to which Narses in imitation of the later emperors of the West had transported his residence, and which he made the seat of his government, together with the towns comprised within the limits of his Exarchate—Rome, the seat of a duke entrusted with the government of the Duchy of Rome—the Pentapolis, including five principal towns with certain localities attached—Pisa,—the country of Naples, with Amalphi and

¹ We know that Justinian, in the constitution by which he confirmed the Digest, § 24, ordered all the judges, in their various jurisdictions, to use the text of the Institutes and Digest:

"Omnes itaque iudices nostri pro sua jurisdictione easdem leges suscipiant, et tam in suis judiciis quam in hac regia urbe habeant, et proponant."

Gaeta, the peninsula of Istria and the neighbouring islands, comprised the only cities and territories which remained in subjection to the sovereignty of the Byzantine Empire, and consequently to the application of the law of Justinian, for any lengthened period.

Even after the enfranchisement of Rome, after the rising of Rome against the edicts of the Emperor Leo the Iconoclast, A.D. 726,—even after the fresh conquests of the Lombards, who had taken from the Eastern Empire the Exarchate of Ravenna, Pentapolis and Istria, A.D. 752, and after those of Charlemagne over the Lombards, who founded the States of the Church and the Kingdom of Italy under Frank dominion, A.D. 774,—Pisa, the kingdom of Naples and the cities on the extreme southern shores, still remained a part of the Empire of Constantinople, till, in the course of the ninth century, these cities enfranchised themselves, and commenced, at least the greater part of them, to assert their independence, so that side by side with Frank Italy, Pontifical Italy and Lombardian Italy, Greek Italy still existed.

If we were to make a calculation we should find that the sovereignty of the Byzantine Empire, calculating from the year A.D. 554, when all Italy was subject to Justinian, was prolonged in Rome one hundred and seventy-two years, in the Exarchate of Ravenna, Pentapolis and Istria one hundred and ninety-eight years, and throughout the other parts of Greek dominion about three hundred years.

These figures are sufficient to explain the maintenance of Justinian's law in actual practice among those people, the greater portion of whom styled themselves Romans. This law, so far as it concerned the *jus civile privatum*, was only modified by custom or by special provisions made from time to time, and especially after the enfranchisement of the cities, to which we have already alluded: but the law of Justinian remained fundamentally the same. We may indeed confidently assert that this law scarcely underwent any alteration by the successors of Justinian at Constantinople, the constitutions of these emperors being limited in Italy to that which concerned public and political matters, and the new Greek form given to the text of Justinian

by the *Basilicæ*, between A.D. 906 and A.D. 911, having taken place only at a period when the dominion of the Eastern emperors over these countries was at an end.

598. Among the cities comprised in the enumeration we have made we must particularize Bologna, Pisa and Amalphi, inasmuch as they are closely connected with the question relating to the preservation and study of the legislation of Justinian. Bologna, which belonged to the Exarchate, remained, for about two hundred years after Justinian, under the rule of Constantinople till the year A.D. 728. Pisa and Amalphi, which remained under the same rule for about three hundred years, being both maritime cities, and having important commercial relations with the East, were rivals; and from the moment when they became independent this rivalry broke out into open hostility, which lasted till Amalphi was vanquished, between A.D. 1136 and A.D. 1138, and never recovered its prosperity.

599. The fact was preserved, and is reported in the thirteenth century by Odofredus, one of glossators of the second phase of transformation, that the public school of Italy had been, on account of the wars, transferred from Rome to Ravenna, in which latter city the seat of the government of the Exarchate was established.¹ Odofredus adds that the books of the laws had been sent to Ravenna, and that from that place they went to Bologna.² The same writer in another place refers to a celebrated MS. of the Pandects, evidently different from that to which former allusion was made, as having been carried directly from Constantinople to Pisa.³ In another chronicle, this MS. is said to have gone from Constantinople to Amalphi. At the time in which Odofredus wrote, and even before him,

¹ Odofredus, in his gloss on the law 82, Dig. 35, 3, *Ad legem Falcidiam*, on the words *Tres partes*: "Studium primo fuit Romæ; postea, propter bella quæ fuerunt in Marchia, destructum est studium: tunc in Italia secundum locum obtinebat Pentapolis, quæ dicta Ravenna . . . , etc."

² Odofredus, in his gloss on the law 6, Dig. 1, 1, *De justitia et jure*: "Cum studium esset destructum Romæ, libri

legales fuerunt deportati ad civitatem Ravennæ, et de Ravenna ad civitatem istam (Bologna)."

³ Odofredus, in his gloss on the law 23, Dig. 6, 1, *De rei vindicatione*: "Unde si vidcatis Pandectam quæ est Pisis, quæ Pandecta, quando Constitutiones fuerunt factæ, fuit deportata de Constantinopoli Pisis, est de mala littera."

there could have been but few manuscripts extant, the great bulk having perished during the previous age, and those in existence must have been copies, perhaps second or third hand, the origin of which it would be impossible to determine with precision. But we may take it as certain, that whether they came from the East, or whether they were copies made at a later date, and at whatever date, in Italy, these manuscripts were remnants of the original publications which had been made in pursuance of the pragmatic sanction of Justinian. We do not speak of the entire body of the legislation of this prince, preserved by certain Italian historians in the middle ages, nor of that passage in the works of Paul the Deacon, secretary of the King of the Lombards in the eighth century, where he describes the various parts of the MS. with so much accuracy as to suggest the inference that he had it then before him, or at least the preface.¹



SECTION CXXI.

THE INFLUENCE OF THE CLERGY UPON THE MAINTENANCE OF JUSTINIAN'S LAW IN ITALY.

600. In the duchy of Rome, which was enfranchised from Byzantine rule A.D. 726, and in the other cities from which, in A.D. 755 and 774, the states of the Church were formed, cities which had for the most part belonged to the Exarchate and to the Pentapolis, there was, independently of the Roman nationality which is to be met with in these populations, and independently of the connection which had lasted one hundred and seventy or two hundred years between these countries and

¹ Paul Warnefrid, surnamed Paul the Deacon (died A.D. 801), *De gestis Langobardorum*, 1, 25, *De regno Justiniani*: "Leges quoque Romanorum, quarum prolixitas nimia erat, et inutilis dissonantia, mirabili brevitate correxit. Nam omnes constitutiones principum, quæ utique multis in voluminibus habebantur, intra duodecim libros coarctavit, idemque volumen *Codicem Justinianum* appellari præcepit. Rursumque singulorum magistratum, sive judicum

(*aliàs*, judicum, jurisconsultorumque) leges, quæ usque ad duo millia pene libros erant extensæ, intra quinquaginta librorum numerum redegit, eumque codicem *Digestorum sive Pandectarum* vocabulo nuncupavit. Quatuor etiam *Institutionum* libros, in quibus breviter universarum legum textus comprehenditur, noviter composuit. Novas quoque leges, quas ipse statuerat, in unum volumen redactas, eundem *Codicem Novellarum* nuncupari sancivit."

the empire of the East, another and a more active cause which contributed to the maintenance and to the study of the Roman law as promulgated by Justinian. This was in the first instance the influence, and afterwards the authority, of the Pontifical court and of the clergy.

601. The ecclesiastics, in fact, claimed the Roman law as their own, allotting it a place second only to canonical law. We find in the *Corpus juris canonici*, addressed to Theodoric, a letter in which Pope Gelasius the First demands that the laws of the Roman emperors, which the Ostrogoth prince had ordered to be maintained, should be so on the ground of the reverence due to the Holy See, its power and prosperity.¹ This reference is to ante-Justinian law. Another pope, Leo the Fourth, wrote to the emperor Lothaire the First, about A.D. 887, a letter, also inserted in the *Corpus juris canonici*, in which we find that the Roman law had up to that time remained in vigour, sheltered from the *universal tempest* (*hactenus Romana lex vixit absque universis procellis*), without any notice being taken of its having ever been corrupted out of consideration to any person; and the writer demands that it should be maintained in force (*ita nunc suum robur, propriumque vigorem obtineat*).² The law here referred to is the law of Justinian in force at Rome at that time.

Confining ourselves to the testimony of the popes, we find throughout the course of centuries, Gregory the Great, who died A.D. 604; John the Eighth, who died A.D. 882; Alexander the Second, who died A.D. 1073, whose letters have been preserved and printed in a general collection, more than once citing the text of Justinian as an authority. In most cases these quotations are made from the Epitome of Julian; in two instances, however, they are from the original text. Under the last of these

¹ CORP. JUR. CAN., *Decret.* 1^a pars, *distinct.* 10, *cap.* 12: "Certum est magnificentiam vestram leges Romanorum principum, quas in negotiis hominum custodiendas esse præcepit, multo magis circa reverentiam beati Petri apostoli, pro suo felicitatis augmento, velle servari."

² CORP. JUR. CAN., *Decret.* 1^a pars, *distinct.* 10, *cap.* 13: "Vestram flagitamus clementiam, ut sicut hactenus romana lex vixit absque universis procellis, et pro nullius persona hominis meminscitur esse corrupta, ita nunc suum robur, propriumque vigorem obtineat." Leo IV. Lothario Augusto.

popes, St. Damian, the Cardinal Bishop of Ostia, who was born at Ravenna A.D. 988, and who died in 1072, quotes the text of five passages from the Institutes in his *opusculum*,—*De parentelæ gradibus*.

Similar quotations are to be found in the collections of canonical texts which were composed in Italy in the ninth, tenth and especially towards the end of the eleventh centuries; these collections have not been edited; many of them, however, had been circulated in manuscript, and were in use among the clergy till the period when they were supplanted, in 1151, by that collection known as the *Decretum Gratiani*, which forms the first part of the *Corpus juris canonici*.

602. Nothing therefore is more clear than the fact that the law of Justinian was maintained without interruption as the common and governing law; ranking, however, at the Pontifical court and with the clergy, as secondary to the canonical law. When Odofredus reports the transfer of the books of law, together with the public school, from Rome to Ravenna, he does not say that copies of the Roman law no longer remained in Rome. This transfer must be held to apply to the official manuscripts, which it is only reasonable should be transferred to the seat of government, or to those which were used for the purposes of instruction, given or sold, as the case may be, to the professors and students, either by the copyists or the libraries (*stationarii*); for it is reasonable to suppose that these also went with the school to Ravenna. But neither the authorities whose duty it was to apply the law, nor the clerks who were the guardians or depositories, by whose pens the manuscripts were copied, renewed and multiplied, continued without the text of the law of Justinian, which remained in force and vigour, according to Pope Leo the Fourth, in the year 887, thus having survived the universal storm.

603. The influence of the clergy in the preservation of Roman law was general, and was not limited to the States of the Church, but extended naturally to every place in which ecclesiastical influence was felt. Thus we find in those portions

of Italy where the law of Justinian had been promulgated, A.D. 554, but where the government of Constantinople had existed but a few years, it was this law of Justinian to which the clergy always appealed; thus we find in a letter of Atto II., bishop of Vercell, in 945, and who died about the year 960, written in those countries which had from the first formed a part of the Lombard conquests, this opinion expressed: that it behoved ecclesiastics themselves also to follow in many things the law of the Roman emperors (*quorum legem, etiam nobis sacerdotibus, in multis convenit observare*); and at the same time he adduces in reference to the law of marriage various fragments from the Institutes and Digest of Justinian, and from the Epitome of Julian.¹

We also find in other parts of the Western Empire appeal made by the clergy to the Roman law which had been in force at the time of the conquest, that is to say, to ante-Justinian law.



SECTION CXXII.

THE INFLUENCE OF THE PRINCIPLE OF THE PERSONALITY OF THE LAWS UPON THE MAINTENANCE OF THE LAW OF JUSTINIAN IN ITALY.

604. Another and still more general cause than ecclesiastical influence is to be found in the principle of the personality of the laws, an interesting legal phenomenon presented by the different barbarian kingdoms. It must not be supposed that the Roman system, which had permitted so many different nations to retain their native laws, had been ignorant of this principle. The barbarians themselves, who had been admitted into the empire, had already enjoyed the privileges of Romans, but the superiority of Roman law became more conspicuous in proportion as the various barbarian tribes succeeded in supplanting the Roman sway. The edict of Theodosius, general as it was, had not de-

¹ Atto, *Epistola ad Azonem Episcopum*." The complete works of Atto

were edited and published by Ch. Barontius, Vercell, 1768, in 2 vols.

stroyed this personality in Italy, inasmuch as this edict scarcely touched upon matters of private civil law; long afterwards, in the middle ages, towards the end of the ninth century, a constitution of the Emperor Lothaire the First, which is inserted in the *Corpus juris canonici*, ordered that the entire population of Rome should be interrogated, and that every man should state the law under which he desired to live.¹ This is the period at which Pope Leo IV. had demanded of this same emperor the maintenance of Roman law, which, he said, had remained in its vigour notwithstanding the "universal tempests." The great mass of the ecclesiastics, and the larger portion of the population of Rome, then professed the Roman law, which was that of Justinian. The Germans, however, of various nationalities, who were mingled with this population, were also admitted to make a profession of their respective laws.

605. Thus, throughout all the modern nations which were founded by the superstructure of the barbarian races upon the Roman world, the law was personal: the conquerors adhered to their barbarian laws; those subjects who were of Roman origin, and all the ecclesiastics, continuing to be governed by the principles of Roman law. It was only in those countries which had been subjected to the authority of Justinian that the Roman law consisted of the law of that emperor. In the other fractions of the Western Empire it was a Roman system of anterior date that was observed, which consisted chiefly of those Roman laws which had been collected and published by the various barbarian kings.

606. In this way Roman law, whether Justinian or whether ante-Justinian, survived the conquest; and, even in the obscurity and during the development of the feudal system, it was perpetuated, if not as a science at least in practice, leaving the

¹ CORP. JUR. CAN., *Decret.* 1^a pars, *distinct.* 10, cap. 14: Lotharius imperator: "Volumus, ut cunctus populus Romanus interrogetur, qua lege vult vivere: ut tali lege quali lege professi sint, vivant, illisque denuntietur,

ut hoc unusquisque, tam Judices quam Duces, vel reliquus populus sciet: quod si offensionem contra eandem legem fecerint, eidem legi qua profitentur vivere, per dispensationem pontificis et nostram, subjacebunt."

proofs of its authority in the decisions, in the acts, in the formulæ of those times, and in the letters or writings of learned men who shed light upon this age of almost universal darkness. The illustrious M. de Savigny has carefully and patiently followed, through the length and breadth of Europe during the long period of the middle ages, the traces of this practical existence of Roman law. The researches of this distinguished author have put an end to the vulgar notion that the Roman law was lost during the middle ages. The work of Savigny is not a discovery, it is a demonstration. A portion of it consists of little more than series of documents and extracts, chronologically arranged, some of which are of an unimportant character, but they are valuable as arguments, elaborated with the utmost patience, and collected with the most scrupulous exactitude. In other chapters he makes use of these materials with that skill and ingenuity for which he is so remarkable.

SECTION CXXIII.

FIRST INDICATION OF THE LAW OF JUSTINIAN IN GAUL.

607. The fate of Roman law during the formation of the modern nations of Europe is a matter of particular interest to us (the French), so far as it is connected with the Gauls. To this subject M. de Savigny, and with still more attention our learned and much regretted friend Laferrière, have dedicated several pages.

We find that the two general causes, the influence of the clergy and the principle of the personality of the laws, produced in Gaul, from the first, their ordinary effect of maintaining Roman law. But in parts where the collections of Justinian had never been promulgated, Roman law meant ante-Justinian law, together with the collections of the law of the Romans made and published by the order of the German kings: the Roman law of the Visigoths, commonly called the *Breviarium Alarici*, of the year 506, and that of the Burgundians, for the sake of brevity called the Papian, published shortly after

the year 517. The latter of these two systems enjoyed but a short-lived authority. Published at the earliest in A.D. 517, it lost in A.D. 534, that is to say, within seventeen years, the support of the power from which it had emanated, the kingdom of the Burgundians having been absorbed in the conquests of the Frank kings. Its credit was soon effaced by the *Breviarium*, which, whether as to the number, the choice or the arrangement of the texts extracted from the various sources of Roman law, was far superior. The *Breviarium*, though compiled in southern Gaul, extended its influence to the north. Of all the enactments of Justinian, it only adopted the latter part, that is to say, the *Novellæ*, and these not from the original text, but from the abridgment of Julian; and M. Laferrière authoritatively declares that the most scrupulous research has not enabled him to trace any others down to the end of the eleventh century.¹ This Epitome of Julian appears to have been known in France in the ninth century, doubtless owing to the relations that existed between the French clergy and those of Rome. From this period the *Breviarium* and the Epitome of Julian frequently went together, being transcribed one after the other in the various manuscripts of the time.

¹ Laferrière, *Histoire du droit Français*, vol. 4, pp. 285 and 286. We may therefore accept it as a theory, in the present state of our historical knowledge upon this point, that all the adoptions and all the quotations relating to the law of Justinian, whether public or private, in French documents of the middle ages, down to the end of the eleventh century, refer exclusively to the *Novellæ* of Justinian, comprised in the collection of Julian.

A constitution of Pope John VIII., promulgated in the council held in France in the year 878—the council of Troyes—enacts, in relation to the composition of sacrilege, "*Inspectis legibus Romanis, invenimus ibi a Justiniano imperatore legem compositionis sacrilegii compositam . . .*" (Sirmond, *Concil. Gall.*, cap. 3, p. 480). The law here alluded to is that of the emperors Arcadius and Honorius, and is to be found in the Code of Theodosius, 16, 2, *De episcopis et clericis*, 34, and passed from that into the Code of

Justinian, 1, 3, *De episcopis et clericis et monachis et privilegiis eorum, et de nuptiis clericorum retitis seu permissis*, 13,"—a chapter unquestionably well known and studied by the clergy of the court of Rome. The Pope here discards the Roman law, and replaces it by a law of Charlemagne of more lenient character. Thus we see indications of a code of Justinian in Gaul in the year 878. We do not agree with Laferrière, that the name of Justinian is here an error of the copyist; but this indication, though extremely vague, is found in a constitution of the Pope, made in a council presided over by himself, and not in a national document. Thus we have some little light thrown upon the existence of the works of Justinian in France by the clergy of Rome and Italy in ecclesiastical matters. Similar institutions may be met with under like circumstances in other councils, without in any way affecting the law of the country.

608. Thus confining ourselves to the writings of the clergy, it is only passages from the *Breviarium* which are to be met with in a letter of Alcuin, who died in the year 804, in his abbey of St. Martin of Tours, after having seconded the efforts of Charlemagne to establish institutions for the teaching of ecclesiastical science and literature. The Epitome of Julian, as well as the *Breviarium*, are referred to in the works of Hincmar, Archbishop of Rheims, in the year 845, who died in the year 882. It is apparent from the quotations made by this learned man that he was also acquainted with the Gregorian Code, the Hermogenian, and the Theodosian, and with the *Collatio mosaicarum et romanarum legum*. The *Breviarium* also appears in one passage, and the Epitome of Julian in several fragments, in the collection of canonical texts compiled by another learned French clergyman of the middle ages Abbon l'Orléanais, abbot of the monastery of Fleury, in the year 988, author of an abridgment of the lives of the Popes down to Gregory II., who was Pope from the year 714 to 731. This abbot took part in three councils, and made two journeys to Rome as envoy from King Robert to Pope John XV. in 986, and to Pope Gregory V. in 996. He died in the year 1004.

609. As to the other works of Justinian, in order to trace them into France, we must go to the other collections of canonical texts, the *Pannormia* and the *Decretum*, which were composed by St. Ives—not Yves, of Brittany, the patron of the advocates—but St. Ives who was born about the year 1035, in the territory of Beauvais, who was bishop of Chartres in 1092, and who died in 1115. In these we, for the first time, so far as we know, meet with extracts, not only from the *Breviarium* and the Epitome of Julian, but from the Institutes, the Digest and the Code of Justinian, numerous fragments of which are incorporated in these collections, and are doubtless due to the influence of Italy.

Ives, in fact, had been a pupil of that school of Benedictines of the Abbey of Bec in Normandy which was founded by Lanfranc, and which became one of the most celebrated in Europe. He was there initiated into Italian science by his

master Lanfranc, who, born at Pavia of a senatorial family, first made his appearance in that city as a student, and afterwards as a teacher of secular law, and there acquired a great reputation before going to France and becoming a Benedictine at Bec. Ives had as a fellow pupil another Italian, Anselm, from Aosta in Piedmont, who was of the same age, having been born in 1033; he also, at a later date, became prior of the monastery, afterwards an abbot, and subsequently Archbishop of Canterbury, and was canonized, as was Ives, under the name of St. Anselm. In addition to these Italian predilections, in consequence of the objections made to his election when he had been unanimously nominated bishop by the clergy and the faithful of the town of Chartres, he went to Rome with deputies from the town, and was there consecrated bishop by the Pope himself, Urban II. He took part in the council of Clermont, presided over by the same Pope in the year 1095, and in the council of Beaugency, presided over by a legate in the year 1104. So that, as an ecclesiastic and scholar, having such close relations with Italy, and desiring to compose for France a collection of canonical texts, it is difficult to believe that he did not procure for the prosecution of his undertaking some collections similar to those which had been produced in Italy, and which were in vogue amongst the Catholic clergy; he would, of course, seek the most recent and latest texts. More than three hundred years separate his time from the invention of printing, but the copyists—and especially the clerks—multiplied the MSS. In addition to the collection dedicated to Anselm, Archbishop of Milan (A.D. 883 to 897), and that dedicated to Anselm, Bishop of Lucca, who was almost a contemporary of Ives of Chartres, as he died in the year 1086, only nineteen years before him (both of which collections had been widely circulated), we know of three others belonging to the eleventh century, the last of which only extends to the decretals of Urban II., who was Pope from A.D. 1088 to A.D. 1099. In the first two of these collections various passages are to be met with from the various works of Justinian, except the Pandects, and in the last from them also.

We now approach the period when the study of the law of

Justinian was pursued with the greatest energy and success at Bologna. Ives was the contemporary of Irnerius, and when he died at the age of eighty, in the year 1115, this chief of the school of glossators had already attracted attention to himself at Bologna by his teaching, and was about to enter the service of the Emperor Henry V. He entered it in the year 1116, and was also in it in the year 1118. The mode of instruction adopted by Irnerius had been pursued by others before him in Italy. The possession of the legislative works of Justinian by the Bishop of Chartres, and the use made of them by him in France, in his collection of canons and in his letters, are evidently connected with these events.

610. Before devoting a few words to the revival of the public study of the law of Justinian, we shall make two observations of an important character, to which we direct the attention of our readers. First. The rule as to the personality of the laws, according to the origin or declaration made by each individual, could only be in force during a given time. In proportion as the fusion of races and the development of each nation in modern Europe progressed, individual distinction or difference must have disappeared, leaving behind it only a combination of usage with enactments and judicial practices, which would vary according to the nature of their origin, and the circumstances and conditions under which they grew up in each state. Secondly. In this work of elaboration the various Germanic laws, and the various usages of each people, would furnish elements destined to become absorbed in the new growth, without leaving their names attached to them; whereas beyond and besides these, two of the elements of the general structure must, from their very nature and their authority, stand out conspicuously from the rest: these two were the canonical law and the Justinian law.

SECTION CXXIV.

REVIVAL OF THE STUDY AND TEACHING OF THE TEXTS OF JUSTINIAN TOWARDS THE END OF THE ELEVENTH CENTURY—THE SCHOOL OF BOLOGNA AND THE GLOSSATORS—PLACENTINUS IN FRANCE, VACARIUS IN ENGLAND.

611. Savigny has, more than once, employed the expression "revival," and has made it a title of one of his chapters. It is a term we may safely use. The confusion and obscurity of the middle ages in literature and science extended also to laws. The Roman law, in many places and in many points, existed in practice but without cultivation; the evidence that we have of the existence of this latent practice are a few quotations in the writings of the exceptional men of their time. Towards the latter end of the eleventh century a true revival took place,—a revival of intellect and consequently of the study of law. The movement was not sudden, but had been foretold, as the return of animation is to the body by certain faint breathings and gentle motions,—the precursors of returning life.

612. Thus Peter Damian, Bishop of Ostia, who was canonized and known under the name of St. Damian, speaks of the discussion which took place concerning civil and canonical law in his time at Ravenna as to the degrees of relationship, during which discussion the authority of the Institutes of Justinian was called in aid.¹ This testimony is of the greatest importance, because Ravenna was his native country. He was born in the year 988, and died in 1072. We can infer, independently of what he says concerning the Institutes of Justinian and of the existence of the doctors whom Damian sent back to consult their codes (*ad vestros codices, ad Instituta vestra recurrite*), that during the course of the eleventh century this school, originally transferred, as we know, from Rome to Ravenna, played an important part. Lanfranc, who in 1042 became a benedictine of the monastery of Bec in Normandy,

¹ See his work, *De parentela gradibus*, in Italian, 1783, Paris edition, 1663: "Revennam, ut nostis nuper adii

. Erat autem de consanguinitatis gradibus plurima disceptatio." Vol. iii. p. 77.

who was afterwards called by William the Conqueror to the archbishopric of Canterbury, and who was the trusted counsellor of that prince, first studied and afterwards publicly taught the law with great distinction at Pavia, his native place;¹ he died in 1089. Thus we see that in the first half of the eleventh century law was publicly taught in Pavia. It is true that we gather from certain documents that this instruction was principally confined to the law of Lombardy. Pepo, a magistrate of Bologna, who figures in this character in an act of the year 1075, had in the same century given a public course of law at Bologna.²

613. It was Irnerius who was the founder of that school of Bologna, which became as famous, and as much frequented for the study of the laws of Justinian, as was that of Paris for theology and literature. Our knowledge of the nature of the instruction imparted by him is, for the want of documents, limited to a very small portion of his career. He acquired his celebrity under the protection of Mathilde, Duchess of Tuscany and Countess of Reggio and other places, who was surnamed the Great Countess, and who died in the year 1115. He confined himself chiefly to Bologna and to Rome, where the Emperor Henry V. summoned him in the year 1118 to confer upon him an important office. At this period we lose sight of him, and know nothing about his subsequent history.

He belonged to Bologna, and, notwithstanding the German form of his name, he must not be regarded as a German. We find his name in various forms: for example, Wernerius or Gernerius, Warnarius or Guarnarius, Yrnerius, or, more simple,

¹ Gilbert Crispin, an abbot of Westminster, who wrote his life in the introduction to the edition of his works published in Paris 1648 (after telling us that he had been instructed in his youth in the schools of the liberal arts and secular laws belonging to the eleventh century), which is now in the library of Naples, adds: "In ipsa ætate sententias depromere sapuit, quas gratanter jurisperiti vel prætores civitatis acceptabant. Meminit horum Patria." The law re-

ferred to was the Lombardian law, which, during the tenth and the commencement of the eleventh centuries, was the chief object of study in the school of Pavia, where Lanfranc had been during his youth.

² Odofredus, upon the law of the Digest, 1, 1, *De justitia et jure*, 6, f. Ulp.: "Quidam Dominus Pepo cœpit auctoritate sua legere in legibus, tamen quidquid fuerit de scientia sua, nullius nominis fuit."

Irnerius. He was surnamed *lucerna juris*, and was the first of those known as the Glossators.

614. This name has been given to them on account of the nature of their principal labours, which, in addition to oral instruction, consisted in inscribing upon the manuscripts of the laws of Justinian notes, at first exceedingly brief but which afterwards became more extensive. These notes were interlineary or marginal; their publication served as the material out of which the whole edifice of the legal science of this period was constructed. *Glossa*, and for the sake of euphony, *glosa*, an obscure word, signifies the explanation of abstruse words and difficult passages, "*linguæ secretioris interpretatio*" (Quintilian, lib. i.). This practice had been known at an earlier date. The Bible had its gloss from the ninth century, and we have an example of the same system being applied to the law of Justinian in a very old gloss of the Institutes called the Gloss of Turin, which has been published by Savigny in the appendix to his History of the Roman Law of the Middle Ages. Their labours, however, in this respect were considerable and important, and extended to the whole body of Justinian's law, and were regarded as an authority throughout Europe; indeed we at the present day are more indebted to these writers than we are generally aware.

Glos, in its passage through the various languages of the world, has become commentary, *jaserie* (twaddle), criticism more or less ridiculous, and from being brief has grown prolix. La Fontaine makes his monkey comment (gloser) upon the elephant, and Boileau all mankind upon the misadventures of marriage :

"Je sais que c'est un texte où chacun fait sa glose."

615. The school of the glossators in its first phase, which embraces the whole of the twelfth century, decreased in valuc, and terminated with Accursius before the middle of the thirteenth century. As to this period of about one hundred and thirty years, we shall limit ourselves to noticing those of the

glossators known as the four doctors to Placentinus and to Vacarius.

The four doctors, who may be reviewed together, were—1st, Bulgarus, surnamed, like Chrysostom, the mouth of gold (*os aureum*); died in the year 1166; 2nd, Martinus Gosia; died shortly before Bulgarus; 3rd, Jacobus; died in 1178; and 4th, Ugo, who died between 1166 and 1171. All four belonged to Bologna, as did the founder of their school. One of their contemporaries ascribed to Irnerius this distich, in which he assigns to each his character, and designates Jacobus as *alter ego* :

“Bulgarus est ærum,¹ Martinus copia legum,
Mens legum est Ugo, Jacobus id quo ego.”

Placentinus, who belonged to Placentia, and was born about the year 1120, is remarkable from the fact, that after the public declaration made by William, Lord of Montpellier in the year 1180, whereby he abolished the monopoly of instruction in that city, he founded at Montpellier our first school of law and introduced the writings and the system of the glossators. Here too he composed several of his works. After being in Italy for several years he went a second time to Montpellier, where he died in the year 1192.

Vacarius, who was a Lombard, was famous in the same way in the history of England. He was taken from Bologna to England in 1144, by Theobald, Archbishop of Canterbury. He took with him his manuscript of the texts of Justinian, and founded a school of law at Oxford, thus introducing as a novelty in England the system of instruction of Bologna. It was in order to spare those students who had no pecuniary resources the expense of obtaining costly manuscripts that he made extracts from the various parts of the law of Justinian, adding certain extremely brief glosses. This work was entitled *Liber ex universo enucleato jure exceptus* (or *extract*), *et pauperibus præsertim destinatus*; whence is said to be derived the name of *Pauperists*, which was formerly, and for a long time, applied to the students of Oxford.

¹ Should not this be *aureum*, in allusion to his surname, “mouth of gold?”

616. The school of Bologna, during this period of active study and propagation of the texts of Justinian, attracted to it a great crowd of students, who came from various parts of Europe. There were, it is said, at one period, ten thousand members of families, small and great, clerical or lay, studying there, many of them being already grey with age.

The fame of this school had reached Paris, and it is to this that we owe the anecdote concerning Abelard, who turned the lawyers into ridicule, and boasted that he could explain any passage whatever of the *Corpus juris*; a small portion of the Code was presented to him, and before he had reached the second line he was obliged to confess his inability: "*Nescio quid velit dicere ista lex.*" The pupils of the glossators had maliciously selected a difficult passage.¹ The anecdote, if true, is necessarily anterior to the year 1140. From this date the practice of translating various portions of the *Corpus juris* into French commenced. Many of our learned men have possessed manuscripts, the most ancient of which was a translation of the Code made about the year 1135.² We have still in our library of Montpellier, and in the Imperial library, MSS. belonging to the thirteenth century, which are translations from the Digest, the Code and the Institutes.

Bernard, preacher of the second crusade in 1146, the accuser of Abelard, whose condemnation he secured in the Council of Sens, and of Arnold of Brescia, whom he caused to be expelled from France, while waiting the slow fire which was to consume him at Rome, declaimed vehemently before Pope Eugenius III., who filled the holy see from 1145 to 1153, against the ardour with which the ecclesiastics, even in the

¹ Odofredus, Gloss upon lex 5 of the Code, book 3, tit. 39, *Finium regundorum* (this is the law in question): "Dicitur quod fuit quidam qui vocabatur Petrus Bailardus . . . Et valde deridebat legistas et jactabat de quod nulla lex esset in *Corporibus juris*, quantumque esset difficilis in littera, quin in eam poneret casum et de ea traheret sanum intellectum. Unde una die fuit sibi ostensa a quodam ista lex, et tunc ipse dixit: Nescio quid velit dicere ista lex. Unde derisus fuit."

² Julien Brodeau, *Annotations sur les arrêts de Locret*. I have in my possession the ancient French translations in MS. of the Code of Justinian, made in the time of Lothaire II. and of Pope Innocent II., about the year 1135. See also upon this subject Ménage, *Observations sur la langue française*, part 1, cap. 3; J. Doujat, *Historia juris civilis Romanorum* (1678); the President Bouhier, *Observations sur la coutume de Bourgogne*, cap. 4 (34), vol. 1, p. 389.

papal palace, devoted themselves to the laws of Justinian instead of the laws of our Saviour: "*Quando oramus? Quando dozemus populos? Quando ædificamus Ecclesiam? Quando meditatur in lege? Et quidem quotidie perstrepunt in palatio leges, sed Justiniani, non Domini.*"¹ Successive councils—that at Rheims in 1131, the Lateran in 1139 and that at Tours in 1162—prohibited the religious from making a profession of the study of modern laws under penalty of excommunication.² The decretal of Honorius III., in 1220, re-enacted this prohibition, adding a prohibition against teaching Roman law at Paris and the neighbouring towns, also under pain of excommunication.³ The motive ascribed for the decretal is worthy of note. It is that in France, that is to say, in the province anciently called the "Isle of France" and in several other provinces, the laity did not use the laws of the Roman emperors (*Quia in Francia et nonnullis provinciis, laici Romanorum imperatorum legibus non utuntur*); and as to ecclesiastical matters, that there is very little which cannot be explained by canonical law. This is the reason assigned; the real object was to preserve in the university of Paris the monopoly of theological instruction, and in Italy the preponderance of the school of Bologna.

There was some reason in the decretal for saying that the Roman law was not received as a governing law in the Isle of France and in the surrounding provinces, especially the texts of Justinian. The result of this prohibition as to Paris was the establishment of the school of law at Orleans, which took place about 1236; and in the south, where, from the time of Placentinus, the school of Montpellier had existed, several others were established, the chief of which was that of Toulouse in 1228.

¹ Bernard, *De consideratione, ad Eugenium III.*, lib. i. c. 4. Vol. ii. p. 410, of edition of 1690.

² "*Statuimus ut nulli omnino post votum religionis et professionem, ad physicam, legesque mundanas legendas permittatur.*" This last council was presided over by Pope Alexander III.

³ The provisions of the decretal of Honorius III. have passed into the *Corpus juris canonici*, Decret. Greg. IX. lib. v. tit. 33, ch. 28: *Parisiis et in*

locis vicinis jus civile legi non debet.

"Firmiter interdicimus, et districtius inhibemus, ne Parisiis, vel in civitatibus seu aliis locis vicinis, quisquam docere vel audire jus civile præsumat." Dumoulin, three hundred years later, made a note on this provision, with the following protest: "*Ego vero dico quod Papa non habuit potestatem prohibendi in regno Franciæ, sive laicis, sive clericis: quia regnum Franciæ nullo modo dependet a Papa.*"

All these universities, and those which were established in great numbers in the following centuries, taught the canon and the civil law from the texts of Justinian, the University of Paris being only able to teach this latter law as an accessory whenever considered necessary for the purposes of the canon law. In 1576 an order of the Parliament of Paris was necessary to accord as an exceptional favour—which was not to be held as a precedent—to Cujas and the contemporary doctors of canon law of Paris, the faculty of lecturing, professing and graduating in civil law in that city, on account of the peculiar circumstances of the time, that is to say, on account of the religious troubles which had interrupted the course of study at Bourges. The prohibitions of 1220, against which Dumoulin struggled in vain three hundred years after, in the protest which we have mentioned in our note, which prohibitions were renewed by the edict of 1579 to the États de Blois, art. 69, were not removed until the edict of Louis XIV., in April, 1679, after having existed for upwards of four hundred and fifty years.

617. The glossators, notwithstanding that the gloss had been their chief and characteristic work, did not limit themselves to it. They also wrote what were called *apparatus*, which were extended and connected glosses, forming a species of commentary upon an entire title or section of the *Corpus juris*;—*summæ*, which were summaries or *résumés*, by the means of which they opened up the course of instruction they proposed to pursue;—*casus*, confined to constructing upon each law, that contained any difficulty, a species of example or illustration;—*brocarda*, or rules of law drawn from the texts and given in their entirety, with parallel paragraphs containing apparent difficulties, with the attempts to explain them. Azo, who had amongst his pupils Accursius, was celebrated, in addition to the reputation that he acquired as an instructor, for his *summæ*, his *apparatus*, and his book of *brocarda*. We have the lessons of certain of the glossators, as published either by themselves or by their pupils. In addition to all this, the glossators, and amongst them Irnerius, were in the habit of writing special treatises, but mainly upon actions and the mode of procedure.

SECTION CXXV.

BRACHYLOGUS ET PETRI EXCEPTIONES LEGUM ROMANORUM.

618. The historian of legal literature meets about this period with two elementary manuals of Roman law upon the text of Justinian, one composed in Italy, the other at Valencia in Dauphiny, the date of which is between the end of the eleventh century and that of the twelfth. We are not able to determine accurately whether these were anterior to the school of the glossators of Bologna, or whether they may be ascribed to the impulse given by that school: both are constructed upon the model of the Institutes of Justinian, and are, like the Institutes, divided into four books, having, however, modifications in the order in which the subjects of which they treat are distributed, the Institutes being the basis. We find in connection with them the Pandects, the Code, and the *Novellæ* from the Epitome of Julian. The work composed in Italy is more particularly upon Roman law; that composed at Valencia adapts this law to the various institutions or local customs, to the canon law, and to the exercise of jurisdiction in that province. It is with this object dedicated to Odilo, the vicar or representative of the lord justice, under the sovereignty of the then reigning Emperor of Germany, for the province of Arles, in which Valencia was situated.

The Italian work, which in many of the manuscripts is without title, and in others has various titles, the *Corpus legum*, *Summa Novellarum*, has been generally known during the last three centuries under the title of *Brachylogus totius juris civilis*, or, more briefly, *Brachylogus*, which signifies a brief discourse or *précis*. This name was given to it arbitrarily in an edition of 1553; another edition, which appeared in 1570, gave it the name of *Enchiridium*, or manual; but the name *Brachylogus* is that by which it is generally known. Savigny is of opinion that the work was composed at the commencement of the twelfth century, and he is disposed to ascribe it, though without positive proof, to Irnerius himself. It must not be forgotten that the school of Irnerius belonged to the latter end of the eleventh

and to the earlier years of the twelfth century, and that we hear no more of him after 1118.¹

As to the work commenced at Valencia, it is known under the title borne by several of the manuscripts, *Petri exceptiones* (extracts) *legum Romanorum*, or, by contraction, the *Petrus*. We know nothing of this Petrus except what we gather from the work itself, save that he inhabited Valencia or its territory. Savigny is of opinion that his work is anterior to the school of Bologna, and even to the collection of canons made by Yves of Chartres, of whom we have already spoken. It serves as a proof that the law of Justinian was known and observed in that part of Gaul before the works of the glossators. This is explained by the influence of the sovereignty of the German empire upon these countries in the eleventh century, and from the connection that it had with Italy. We, however, are inclined to adopt the opinion of Laferrière, that the book of *Petrus* is posterior to the collection of the canons of this Yves of Chartres, and consequently posterior to the commencement of the school of Bologna, inasmuch as Yves of Chartres was a contemporary of Irnerius.² This book was probably composed in the first half of the eleventh century. It must be admitted that the author does not give the text of Justinian as a novelty, and that he makes no use whatever either of the Theodosian Code or the Breviarium Alarici, the Roman law in force in Gaul before the introduction of the *Corpus juris* of Justinian.³

¹ Between 1551, the date of the first edition, and 1761, we can enumerate twenty-one editions of the *Brachylogus*, ten of which were published at Lyons, five in Germany, and six in Italy; the modern edition, to which preference should be given, is that of Edward Boecking, published at Berlin, 1829.

² The proof relied upon rests upon a mutilated passage no longer having any meaning which appeared in a portion of the *Petrus* (3, 36), which appears in a collection of the canons of Yves of Chartres (3, 98). As this mutilated passage is also to be found in the collection of the canons composed at Saragossa, and styled *Cesar August-*

tana, we must conclude, with Laferrière, that this latter collection is posterior to Yves of Chartres. See, upon the *Brachylogus*, Savigny's *Histoire du droit romain au moyen-âge*, vol. ii. par. 451, etc., of the French translation, and upon the *Petrus*, the same work, p. 82, etc., compared with Laferrière's *Histoire du droit*, vol. iv. p. 293, etc.

³ The first edition of the *Petrus* was published at Strasbourg in 1500; for a modern edition of the same, reference should be made to Savigny in his Appendix, vol. iv. p. 293, to the translation of his *History of the Roman Law of the Middle Ages*.

SECTION CXXVI.

MANUSCRIPTS AND TEXTS OF THE *Corpus juris Justiniani*—
THE PANDECTÆ FLORENTINÆ AND THE VULGATE—THE
ANCIENT DIGEST, THE INFORTIATUM AND THE NEW DIGEST.

619. The glossators do not appear to have known, and, at all events, they have not employed, in their works upon Roman law, anything but the *Corpus juris* of Justinian; their resources were limited to this, and to it they strictly adhered. Although their field was thus limited, it nevertheless afforded them ample scope; but they handled the text roughly; they turned and twisted it in every possible way, as the indefatigable agriculturist turns his soil. It is to them that we are indebted for the references which are contained in the current editions of the present day, and which are of so much use to us; they are the result of a herculean task, of a series of investigations and incessant comparison of each law, and of each passage of the law, with other laws and other parallel passages, analogous, explanatory or contradictory. They also accomplished much by the comparison and critical examination of different manuscripts, often in themselves defective and frequently at variance.

620. There is a legend which, like all legends, has found some to attach credence to it (Sigonius was the first to give it weight),¹ and which was commonly received till the year 1726, when Fr. Grandi, a professor of Pisa, treated it as a fable. From that date it has been a subject of controversy. It says that, in the sacking of Amalphi, in 1137, by the people of Pisa, who were the allies of the Emperor Lothaire, a manuscript copy of the Pandects was discovered, which had been sent to Amalphi by Justinian; that the Pisans carried it to Pisa and received it from the Emperor Lothaire as a gift, and that this discovery and the appearance of the manuscript was the cause of the revival of the study of Justinian law, and the foundation of the school of the glossators at Bologna.

621. The part of this legend which is manifestly false is,

¹ Sigonius, *De regno Italiæ*, ii. 2.

that the alleged discovery was the cause of the revival of the study of the law of Justinian, for it is quite certain that long before the year 1137 Roman law was publicly taught, both at Ravenna and at Bologna; that the school of Irnerius had shed its light far and wide; that this school terminated in 1118, and that the labours of his successors had not merely commenced but had made considerable progress.

It is however true that a manuscript copy of the Pandects, of very great antiquity, embracing the entire collection, which was treated by the city with the greatest veneration and guarded with scrupulous care, did exist at Pisa; that the glossators referred to this particular text by the style of *littera Pisana*, and that, in the year 1406, Pisa having fallen under the dominion of Florence, this valuable document was transported to that city, whence it derived the name under which it has remained famous, viz., that of *Pandectæ Florentinæ*.

The point of controversy is, how and when this manuscript fell into the possession of the Pisans? Odofredus, one of the jurists of Bologna, who belonged to the second phase, who was a pupil of Accursius, and who died in 1265, tells us in bad Latin that this manuscript had been transported from Constantinople to Pisa at the same time as the Constitutions of Justinian.¹ Odofredus was at least a hundred years later than the pretended conquest of Amalphi. Bartolus, who died in 1357, in the forty-fourth year of his age, that is, about a hundred years later, also says that the manuscript had always been at Pisa, and that in a complete condition.² On the other hand, some historical notes in Latin referring to the maritime wars of the Pisans, bearing date 1320, and which are added as an appendix to a statute bearing date 1318, and a passage from a chronicle or annal at Pisa, in Italian, relative to the same wars, and two lines of a poem, all derived from manuscripts of the thirteenth century, explicitly relate the capture of the Pandects at

¹ Odofredus, on the law 23, f. Paul., Dig. 6, 1, *De rei vindicatione*: "Unde si videatis Pandectam quæ est Pisis, quæ Pandecta, quando constitutiones fuerunt factæ, fuit deportata de Constantinopoli Pisis, est de mala littera."

² Bartolus, on the rubric of tit. 3, *Solutio matrimonii*, lib. xxiv.: "Hoc volumen (*Infortiatum*) nunquam fuit amissum. Semper enim fuit totum volumen Pandectarum Pisis et adhuc est."

Amalphi. Savigny, after having investigated the matter, rejects the account given of this conquest, as had Fr. Grandi in the year 1726, and upon his authority this paltry controversy has terminated. Laferrière, nevertheless, who also investigated the matter, believes in the alleged conquest, but both agree that the matter, as it now stands, is of little importance.¹ There is, however, a point which, though of secondary importance, is not without its value, which is, whether Irnerius and the early glossators, by whom he was succeeded up to the year 1137, were acquainted with and used this manuscript or not. If it is true that it only came to the notice of the glossators as the result of the sacking of Amalphi, and that only in the year 1137, it is probable that the sudden appearance of such a document, and under such circumstances, would have been noted in their works. No such mention however occurs.

622. The manuscript of the Florentine Pandects is the only ancient MS. now extant, neither of the others being of more ancient date than the time of the glossators. It is, however, certain that the glossators possessed more ancient manuscripts, which were in existence in Italy in their time, and which have since been lost, doubtless as a result of their own works. It is by the aid of these different manuscripts, by comparing them with each other, and with the MS. at Pisa, that the glossators had been able, piece by piece, to reconstruct the text of the Pandects, known as the *littera Bononiensis*, or text of Bologna, or the *Vulgata*, the accredited and generally received text. It is well to notice the three applications of this term. The *Vulgate* is that Latin version of the Bible alone approved as the canonical text by the council of Trent; the *Vulgate* is the Latin version of the *Novellæ* contained in the *Authenticum*, generally accepted, without any definite authority, before the translations made by the order of the Emperor Justinian for promulgation in Italy; and, finally, the *Vulgate* is that text of the Pandects as reconstructed by the labours of the glossators by a critical examination of ancient manuscripts, and which is now in general circulation.

¹ Savigny, vol. iii. p. 71 et seq.; Laferrière, vol. iv. p. 369.

623. It is a singular fact that the Florentine MS. of the Pandects inverts the order of some of the parts, an arrangement which doubtless arose at an early though unknown date, by a misplacing of the leaves. All the other MSS. have the same inversion. We should be inclined to conclude that all the manuscripts were taken from the original Florentine, or that some still more ancient copies existed from which they all, including the Florentine, have been derived, and in which the same misplacement occurred. Certain passages, however, which are wanting, or which are evidently erroneous in the Florentine edition, but which are to be found or rectified as the case may be in the Vulgate, prove the existence of distinct copies. Among the explanations which have been suggested, and which have given rise to considerable controversy, the most simple is the following, that the manuscript possessed by the glossators did not contain the concluding part of the Pandects, and that recourse was had to a copy of the Florentine MS. in order to complete the others in that respect.

624. The Florentine MS. is in one volume, containing all the Pandects. This was not the case, however, with all the Italian manuscripts. The texts employed by the early glossators came to them in several volumes and at different times. Odofredus, to whom reference has already been made, and who wrote in the thirteenth century, adopted this order.¹ From this fact arose the traditional division into three volumes, which we find in the Vulgate, viz., the *Digestum vetus*, or ancient Digest, the *Infortiatum* and the *Digestum novum*—

“ Je sais le Code entier avec les Authentiques,
Le Digeste nouveau, le vieux, l'Infortiat.”

“ A fine speech to make to a woman !” says the Dorante of Corneille, in the comedy of the *Menteur*.

Many speculations have been hazarded as to the meaning of

¹ Odofredus, gloss on the *Infortiatum*, lib. xxxv. tit. ii., *Ad leg. Fulgid.*, law 82, frag. of Ulp., on the words *Tres partes*: “ Cum libri fuerunt portati, fuerunt portati hi libri: Codex, Dig. vetus et novum, et Institutiones; postea

fuit inventum Infortiatum sine tribus partibus; postea fuerunt portati Tres libri; ultimo liber Autenticorum inventus est: et ista ratio quare omnes libri antiqui habent separatum.”

the term *Infortiatum*—some ingenious, others absurd. Estienne Pasquier wittily refuses to enter into these subtleties; he regards it as a stupid distinction, with three foolish titles, resulting from ignorance, and therefore inexplicable. It is sufficient for the reader to remember, that this is the name given to one of the three sections into which the Vulgate was divided, the other two being called the *Digestum vetus* and the *Digestum novum*.

The division of the Pandects into three sections was transmitted by the glossators to the jurists, who followed them; when the art of printing came into vogue, all the editions of the Pandects, comprising for the most part those of the sixteenth century, were always arranged according to this division; but from the seventeenth century, the arrangement, which is altogether foreign to the spirit of Roman law, has disappeared.

625. There is nothing worthy of remark concerning the manuscripts of the Institutes, which, on account of their elementary character, were far more widely circulated; nor indeed concerning those of the Code beyond this, that the manuscripts used by the glossators only contained the first nine books, the three latter, which deal with public law, being treated separately, either as a volume or as a separate subject of instruction. It was this collection of the first nine books which bore the name of the Codex; the residue, that of *Tres libri*. This division also no longer exists. We will not add anything to what has already been said concerning the manuscripts of the *Novellæ*, except that Irnerius annexed some extracts in the form of glosses to his work, with references to the *Novellæ* or *Authenticum* from which they were derived.¹ Some of his successors increased the number of these notes. These annotations, under the name of *Authentica*, form, in a certain sense, a portion of the body of the Code; they are contained in our editions, and are of great service; those of the Institutes have not been so well preserved.

¹ Odofredus, after relating the anecdote as above, adds: "Sed ipse postea mutavit opinionem suam . . . et dixit quod standum erat illo libro; et in illo

libro studuit optime, et bene scivit eum, quod apparet ex eo quod ipse utilitatem posuit super C. signando auth. quæ leguntur super Codice."

SECTION CXXVII.

THE SCHOOLS OF THE JURISTS FROM THE GLOSSATORS TO THE SIXTEENTH CENTURY.

626. The most celebrated of the ancient European jurists, down to the middle of the sixteenth century, are Accursius, Bartolus and Alciat, to whom must be added Cujas.

Savigny, in his excellent History of the Roman Law of the Middle Ages, mentions during the twelfth and thirteenth centuries, starting with Irnerius, the names of forty-seven jurists who had attained a reputation; and during the fourteenth and fifteenth centuries more than a hundred, amongst whom there are only six Germans and four French, all the others being Italian. Savigny does not go into the sixteenth century, as not belonging to the middle ages.

627. Estienne Pasquier, who commenced the publication of his *Recherches de la France* in 1561, endeavoured to classify these jurists into three ages or schools; the first called the Glossators, the second, who were named, as he says, by scholars the *Scribentes*, and whom he called *Docteurs de droit*; and finally, the third class, whom he is pleased to call *Humanists*, "*pour avoir meslé en beau langage latin les Lettres Humaines avec le Droit.*"

The first series, that of the glossators, closes about the year 1260 with Accursius and his sons; he gave his name to the school, which for a period of about eighty years followed in his footsteps, and laboured at his works till about the year 1340, when Bartolus, the chief of the second series, made his appearance, and in his turn acquired great reputation, which resulted in the Accursians being replaced by the Bartolists. Thus, next to the glossators, who had flourished for one hundred and sixty years, that is, from the year 1100 to 1260 or thereabouts, the second series of Estienne Pasquier in its turn lasted from the year 1260 to 1510, or in other words for a period of about two hundred and fifty years, of which eighty years belonged to the Accursians and a hundred and seventy to the Bartolists. Then Alciat, about the year 1510, opened with

the sixteenth century the third school, in which, though following in the traces of his predecessors, Cujas earned a higher reputation than any.

628. Accursius was born, about the year 1182, in a village near Florence, and died about the year 1260: he was a compiler of glosses. After following the profession of the law for about forty years in the University of Bologna, and acquiring honour and considerable wealth by lending money at interest, and that even to his pupils (so says the Satirist), he retired to the solitude of the country, probably to his beautiful château, the Villa Ricardina, in the midst of his vast domains, there to complete the compilation which he had commenced. This work has been called "the Great Gloss." It contains extracts, collected and combined in the margin of each text, from the entire *Corpus juris*, and is a collection of the ancient annotations of the whole school of the glossators supplemented by his own annotations. His son Cervottus, not, as Savigny says, his son Francis, to whom the credit has been erroneously given, made some additions of slight importance. It is clear that the utility of this work must have been great, inasmuch as it condensed, in a brief and convenient form, the learning of the one hundred and sixty years which followed the revival of the study of Roman law. This book, at one and the same time, gives a summary of the writings of the glossators and destroys their identity. To the fact that Accursius has, in some cases, quoted the names of works and authors we owe our acquaintance with the fragments of the writers whom he has mentioned. As to the works themselves they were, from that time, neglected, and the manuscripts, for the greater part, are lost. For a period of about eighty years, the most servile adherence was shown to this writer, the gloss enjoying a greater authority even than the text. "I prefer the gloss to the text," said Cinus, ironically, who was born in 1270 and died in 1336, to whom we are indebted for the reaction and for the labours of his illustrious pupil Bartolus; "for, if I quote the text, both judges and advocates say to me, 'don't you think that the glossator knew the text as well as you, and that he could understand it better than you?'"

It is owing to the compilation of Accursius, which is a huge mass of contradictions, that all the shafts of historical ignorance, of barbarous Latin, of puerility and of ridicule, that it has been the fashion, since the revival of letters in the fifteenth century, to hurl against the glossators as a body without any distinction, have been levelled at them. Rabelais makes his Pantagruel say (book 2, cap. 5), "*Au monde, lui fait-il dire, n'y ha livres tant beaulx, tant aornez, tant elegans comme sont les textes des Pandectes; mais la bordure d'iceulx, c'est assavoir la Glose de Accurse, est tant salle, tant infame et punaise, que ce n'est qu'ordure et villennie.*" It may be said of the satirist himself that, in his jokes and pleasantries, he not unfrequently conceals the point of his wit under a heap of rubbish. Estienne Pasquier (lib. 9, ch. 34), in a contrary sense, has said concerning Accursius, that he made "*un Recueil général, sous le nom de Glosses, de toutes les anciennes annotations, y adjoustant plusieurs belles observations de son creu, dont il borda les textes de la façon que nous voyons.*" In these days scarcely anyone ever reads the Great Gloss, or indeed has any occasion to read it. Very few lawyers, who by profession are civilians, find it necessary to refer to it. When they do, indeed, it is not without profit; but, independently of the mass of matter with which they are encumbered, the examples, observations and interpretations, the labours of the different glossators will always be of value, first and chiefly because of the construction of the text, secondly for the references by figures to all parallel, similar or contradictory passages which have been applied to every portion of the *corpus juris* and which constitute much of the value of our current editions.

629. Bartolus, who belonged to Sasso Ferrato, in Umbria, was born in 1314 and died in 1357, at the age of forty-four: he was a professor of law in the University of Pisa, and from the year 1343 filled the same post with great reputation in that of Perugia. The labours of the glossators upon the text were ended, and servile attachment to the gloss began to disappear. Amongst the more intelligent, Cinus, the master of Bartolus, had ridiculed it. From that time principles commenced to

take the place of the text and the gloss. The first rank in this new school unquestionably belongs to Bartolus. His commentaries upon the three parts of the Digest and of the Code, his *Consilia*, *Quæstiones* and *Tractatus*, attained a high reputation in Italy, France, Spain and Portugal. His opinion had so much weight in the courts of justice that, according to Estienne Pasquier, the expressions *plus résolu que Bartole*, and *résolu comme un Bartole*, were proverbial.

Bartolus himself tells us that the Emperor Charles IV., to whom he had been sent as a deputy by the inhabitants of Perugia, appointed him his counsellor, and gave him a post in his household. According to him the emperor showed him many other marks of favour, and, among others, conferred on him this singular diploma, that he and all his descendants who should be professors of law should have the power of legitimizing their pupils in cases of bastardy, or relieving them from the disadvantages of minority. The conferring of such powers by a prince upon a professor and his descendants was an exhibition of imperial authority which, in those times, was not likely to produce any very great sensation.

Pantagruel, with the greatest irreverence, treats Accursius, Bartolus, his disciples Baldus, de Castro, and many others, in the same way, "*de vieulx mastins, qui jamais n'entendirent la moindre loy des Pandectes, et n'estoyent que gros veaulx de disme, ignorans de tout ce qu'est nécessaire à l'intelligence des loix*" (lib. ii. ch. 10). In this manner did the revivalists of letters in France throw stones at this Italian brigade and those Italian civilians; "*tous tachez et infectez de ceste ancienne lourdite*," said Estienne Pasquier (book 9, cap. 39). These Italians, however, had amongst them the immortal Dante, Petrarch and Ariosto, to say nothing of their great artists.

630. Estienne Pasquier, in his book 9, cap. 39, says: "*Le siècle de l'an mil cinq cens . . . nous apporta une nouvelle estude de Loix, qui fut de faire un mariage de l'estude du Droit avecques les Lettres Humaines, par un langage latin net et poly.*" This is why he calls the jurists of the third age "Humanistes." This was a literary and historical study of

law ; which did not merely require good and polished Latin, but also demanded the Greek. This school did not, like its predecessors, limit itself to the works of Justinian, it sought the sources of anterior law, both under the republic and under the empire, also tracing it into the Eastern Empire ; nor did it limit its researches to these sources of information ; it ransacked, with equal ardour, the pages of the historian, the prose writer, and the poet. In this way jurists and men of letters in the sixteenth century went hand in hand, not unfrequently being mistaken the one for the other. It is to the warmth of this new discussion that we must refer the invectives of Rabelais, and the ill-sounding epithets of Estienne Pasquier and of so many other writers against the Roman jurists of preceding periods. This absolute contempt, however, was not participated in by the more learned men of the new period, such as Alciat and Cujas, who in many points did honour to the services of their predecessors.

These successive schools, which are marked in history in order that the table may be complete, have no clearly-defined lines of demarcation. For neither in the course of human events nor in that of physical nature are changes instantaneous ; the dawn precedes the day, the twilight gives notice of approaching night, and each has its degrees. Estienne Pasquier, when speaking of the three jurists as pioneers of this new enterprise, that is to say, as being the initiators of the school of the *Humanists*, Guil. Budæus of Paris, André Alciat, an Italian of Milan, and Uldaric Zaze (or Zazius), a German, born in the town of Constance, observes that Budæus in the year 1508, under the reign of Louis XII., published his annotations upon the Pandects in twenty-four books, in which “ *non-seulement il ouvrit le pas au beau latin parsemé de belles fleurs d'histoires et sentences, mais aussi, sur le commencement de son œuvre, se desborda en invectives contre la barbarie des anciens Docteurs de Droit ;*” giving therefore to him the priority over Alciat, whose first publication dates in the year 1518. But by glancing at the 59th cap. of Savigny's work entitled “ The Precursors of the New School,” we see that the leaning towards philology, literature and history as auxiliaries to jurisprudence had been indicated by other writers, the greater number of whom were

Italians, there being scarcely any French, Germans or Spaniards, and these belonged to the second half of the fifteenth century, and, consequently, before Budæus, Alciat or Zazius, and before the movement of the *Humanists* had commenced. Nor must we forget that the revival of Greek literature, under the influence of the Lascaris, had commenced about the same time in Italy, with John Lascaris at the court of Charles VIII., of Louis XII. and of Francis I., which was prior to its appearance in France.

Guil. Budæus was the secretary of Louis XII., and subsequently was counsellor and master of requests under Francis I. He was intimately connected with John Lascaris, the first keeper of the royal library, and may be said to have been the resuscitator of Greek literature in France. He was, however, rather a scholar than a jurist. He rendered assistance to the jurists both as a literate and an antiquarian. Johannes Ulric Zazius published about the same period in Germany a catalogue with annotations and interpretations of various ante-Justinian legal documents, at that time a new field of inquiry, an edition of which was published in Paris in 1534 by Louis Charondas. But the real and greatest Roman jurist of this description before Cujas was Alciat.

631. André Alciat was born at Milan in the year 1492, and died in 1550; by 1518, he had published some of his works, and notably his commentaries upon the three last books of the Code, the *Tres libri*. He became professor of law in the University of Avignon in 1522, and in 1529 was called to the University of Bourges by Francis I., but, being claimed by his sovereign, the Duke of Milan, Francis Sforza, he went to Pavia, afterwards to Bologna, and after the death of Sforza to Ferrara, whither he was attracted by the munificence of the Duke of Tuscany. Estienne Pasquier says that Alciat did not meet with great success amongst his fellow citizens; and he relates that having gone from Toulouse to Italy to complete his legal studies, he received three or four lessons from Alciat at Pavia, and that passing to Bologna, where Marianus Socinus was the professor, according to the ancient practice he found

that all the scholars made much more of him, and that the pleaders preferred to address themselves to Socinus for the simple reason, as they said, that he had never lost his time in the study of the *Lettres Humaines* as had Alciat. The reputation of Alciat was not the less considerable. Several sovereigns endeavoured to attach him to their courts, honoured him with dignities or sent him presents. Pope Paul III. created him protonotary of the Holy See, the Emperor Charles V. a county palatin and senator; and as a result he amassed, it is said, great riches, but did not escape the imputation of being avaricious. The epitaph inscribed upon his tomb in the church of the Holy Epiphany at Pavia concludes with this phrase, "*Primus Legum studia antiquo restituit decori.*" But generosity and a consistent simplicity of character ought always, in the life of the jurist, to keep pace with the acquisition of honours and emoluments.

632. Alciat had been dead about four years, when Jacques Cujas (born at Toulouse in 1522, and who died in 1590), who had already distinguished himself in some branches of study, made his appearance, in the year 1554, as the author of some notes upon Ulpian, and assumed the character of a public professor, by being elected to the chair at Cahors. He acquired a greater reputation than either of those to whom we have already alluded. He filled a prominent place in the new school which he inaugurated, giving a strong impulse to the study of the texts, the history and the philology of Roman law. The services thus rendered by him and by his numerous disciples were of the most durable character. His history, written by M. Berriat Saint Prix, is characterized by that accuracy for which our much-regretted colleague has been so justly famed.

Estienne Pasquier, in the thirty-ninth chapter of his ninth book, concludes the picture which he has drawn of the three ages in the following words:—"Conclusion: repassant sur les trois chambrées de ceux qui ont écrit sur le Droit,—en la première, je fais grand estat d'Accurse entre les Glossateurs;—en la seconde de Bartole (à part Estienne Fabre et Dumoulin, les vrais jurisconsultes de nostre France);—et entre ceux de la

troisiesme, qu'il me plait de nommer Humanistes, je donne le premier lieu à nostre Cujas, qui n'eut, selon mon jugement, n'a et n'aura jamais par aventure son pareil."

It is apparent from what has been said, that the principal field for the cultivation of Roman jurisprudence was, during four centuries, Italy; that it passed thence in the sixteenth century to France; and from the commencement of the present century it has been in Germany.



SECTION CXXVIII.

ROMAN LAW CONSIDERED AS AN ELEMENT OF FRENCH LAW.

633. The principle of the personality of law which supposes distinct races living side by side must necessarily disappear in proportion as these races amalgamate. This result accrued in France as elsewhere; but as it was a work of gradual development, it left this peculiarity, that the law became territorial, whether by the influence of numbers or by that of authority, or by the depth to which the ancient roots had penetrated the soil. In the south the Roman law predominated; in the north the customary law, varying according to the locality; the dominant law in the early period of the monarchy being Germanic.

This contrast is clearly marked by two documents. In the *Constitution generale* of Clothaire I., about the year 560, we see the principle of the personality of the laws recognized.¹ Three centuries later, that is, in 864, in the *Edit sur la paix du royaume* in the national assembly of Pistæ (title 36 of the *Capitulaires de Charles le Chauve*), we find that the law had become territorial, and a distinction drawn between the districts where Roman law was observed and where it was not.² Thus this distinction or division of France into two different parts as to the law which was to be followed is connected with the

¹ Art. 4: "Inter Romanos negotia causarum romanis legibus præcipimus terminari." (Baluze, i, 7.)

² Art. 16: "In illa terra in qua judicia secundum legem Romanam terminantur, secundum ipsam legem judi-

cetur. Et in illa terra in qua judicia secundum legem romanam non judicantur . . . , etc." (Baluze, ii. 173 to 196.) Many other articles, 13, 20, 23, 31, contain similar provisions.

time when cohesion existed between the populations of the same place, when the personal character of the law had disappeared and its territorial character remained. This territorial character was established about three centuries before the introduction of the law of Justinian. We know that till this introduction the expression *Lex Romana* designated in Gaul ante-Justinian law, which consisted chiefly of the Code of Theodosius and the other texts preserved by the *Breviarium Alarici*, to which in the ninth century it was the habit to unite Julian's abridgment of the *Novellæ*.

634. As a result of the labours of Irnerius and the early glossators of the school of Bologna upon the texts of Justinian, as a result of the teachings of Placentinus at Montpellier, and of the spread of the taste throughout Europe for this new study, the law of Justinian was introduced into France, and cultivated as a science without ever having been imposed by any legislative authority. In those districts which had recognized Roman law it replaced ante-Justinian law, and was regarded as the last and most perfect expression of Roman law. In the districts where the customary law prevailed, although it was true, as says the decretal of Pope Honorius III. in 1220, that these countries were not governed according to this law, the legislation of Justinian formed a part of the instruction given by the professors, and our old legal works written in the North, bearing the characteristic features of *Coutumiers* from the reign of St. Louis, exhibit numerous traces of Roman law. France was still divided into two parts, each having its own peculiar law; Petrus of Valentia notices this in his work,¹ but the expression of *pays de loi Romaine* was replaced by that of *pays de droit écrit*, which is to be met with twice in an ordinance of St. Louis, in the month of April, 1250.²

¹ Petri *Exceptiones legum Romanorum*, lib. ii. chap. 31: ". . . His partibus in quibus juris legisque prudentia viget; aliis vero partibus ubi sacratissimæ leges incognitæ sunt. . . , etc."

² Ordonnance de Louis IX. *au sujet des hérétiques*; Vincennes, Avril 1250:

"Art. 4. Licet de consuetudine gallicana aliter observetur, quia tamen terra illa (he refers to Carcassonne, Beaucaire, Toulouse, Cahors and Rouergue) regi consuevit (ut dicitur) et adhuc regitur *jure scripto* . . . , etc." Art. 26: ". . . Tenere vos volumus, quod *jure scripto* in illis partibus ob-

635. In this way France, while it continued to observe the line of demarcation produced by geographical limits and the influence of events, changed in the twelfth and thirteenth centuries the Roman law of Theodosius and Alaric for that of Justinian. It had its *pays de droit écrit* in the south, where the legislation of Justinian formed the principal basis of the law, and its *pays de coutume* in the provinces of the north, where this legislation was only recognized as the complement of the customary law, where it was regarded as a scientific model, and where its study was considered necessary as a branch of legal instruction. The customs did not, in the *pays coutumiers*, prevent, in the case of the law being defective or of a controversy arising, appeal being had to the Roman law, at least as a scientific authority; in the same manner, the Roman law did not in general exclude the influence of customs peculiar to the people. The difference between the two districts was a difference in the proportion in which these two elements were recognized, and still more a difference of spirit and in the general character of the public institutions. This was a confused period in which legislation, impressed with the spirit of feudalism, varied in each part of the same kingdom, a period at which it was only necessary to cross a river or to pass a chain of mountains to find a different code in operation. The idea had more than once occurred to the learned men of the time of introducing a uniform system of law throughout France, but it is to the constituent assembly that we are indebted for the decree which became an article of the constitution of 1791, and which was carried out, though only in part, by the *Code Pénal* of 1791.¹ A civil code was commenced, but not completed; the convention again ordered its preparation, which resulted in the *Code des délits et des peines de brumaire, An IV*. And, finally,

servetur." (*Recueil des Ordonn.*, tit. i. p. 62.)

¹ Décret sur l'organisation judiciaire, du 16-24 Août 1790, tit. ii. art. 19:

"Les lois civiles seront revues et reformées par les législateurs; et il sera fait un code général de lois simples, claires et appropriées à la constitution."


Constitution française, du 3-14 Sep-

tembre 1791, tit. i., in fine: "Il sera fait un code de lois civiles communes à tout le royaume."

Acte constitutionnel et déclaration des droits de l'homme et du citoyen, du 24 Juin 1792 (this constitution was never enforced), art. 85: "Le code des lois civiles et criminelles est uniforme pour toute la République."

under the consulate and under the empire a simple and brief code made its appearance, of such dimensions as to enable it to circulate freely amongst the people, and which, being in harmony with the new condition of things, has placed all upon the same legal footing. This code has been improved by various revisions, which have amended it, without destroying the advantages of codification. These efforts will doubtless be followed by others, for a code ought never to be suffered to stand in the way of progress.

636. The concluding pages of this volume give a mere glance at the later history of Roman law. A proper consideration of the subject would involve considerable space. Roman law is only one of the elements of French law, the other elements are equally worthy of consideration. In order thoroughly to understand this subject, a study of the barbarian law, the feudal law, the customary law, the ordinance law of the monarchy, and the canonical law, is necessary. I therefore conclude, as I commenced, by entreating the reader to regard this work merely as a preliminary step, and only to look upon the history of Roman law as an introduction to the law of France. It may perhaps be permitted to me to undertake a second work. Our labours should be directed to the benefit of our age and of our country, and all intellectual effort should have for its object the welfare of the society of which we ourselves are members, and, if possible, that of the great society of the human race.



EPOCHS OF ROMAN LAW AS GENERALLY RECEIVED.

THE divisions between the epochs of Roman law which I have adopted are those which, as it appears to me, are indicated by the course of history; and I have assigned my reasons for adopting this arrangement.

It is, however, right to state the different divisions which have been generally received. The following is the division adopted by M. Hugo, and with slight variations it conforms to that of Gibbon, who has been followed by succeeding writers.

THE FIRST PERIOD, OR THE INFANCY OF LAW.

From the foundation of Rome to the Twelve Tables, that is, from B.C. 753 to B.C. 454, or A.U.C. 1 to A.U.C. 300. This period is the epoch of the infancy of the state and of its law. At the end of this period we have a written law, which, as to the *jus privatum*, places all the citizens, whether patrician or plebeian, upon the same footing. The fragments of this law constitute the source whence we have to draw the history of the law of this period.

Principal jurist—Papirius.

SECOND PERIOD, ITS YOUTH.

From the XII Tables to the time of Cicero, that is, from B.C. 454 to B.C. 104, or A.U.C. 300 to 650. This period is the

youth of Rome, during which it extended its power. The law became divided into *jus civile* and *jus honorarium*; it was not yet studied as a science, but was a practical system. The social war broke out, and, in order to extinguish it, the rights of citizenship were conferred upon the greater portion of the inhabitants of Italy.

Principal source of information—Cicero.

Principal jurists—Appius Claudius, Flavius, Coruncanus, Ælius and Cato.

THIRD PERIOD, ITS MANHOOD.

The manhood of Rome dates from Cicero to the time of Alexander Severus, that is, from B.C. 104 to A.D. 247, or A.U.C. 650 to 1000. The empire was during this epoch one of the greatest that the world has ever seen. Arts, sciences, and especially jurisprudence, reached their highest degree of cultivation; the *plebiscita*, *senatus-consulta* and the imperial constitutions enacted various important provisions affecting the law, and numerous works aided its development into a grand science, the principles of which were closely interwoven. At the end of this period the inhabitants of the provinces were almost entirely assimilated to Roman citizens.

The fragments now extant of the works which appeared during this period constitute the source of our information concerning it.

Principal jurists—Scaevola, Servius Sulpicius, Labeo, Sabinus, Julian, Gaius, Papinian, Paul, Ulpian and Modestinus.

FOURTH PERIOD, ITS OLD AGE.

From Alexander Severus to Justinian, that is, from A.D. 247 to A.D. 547, or A.U.C. 1000 to A.U.C. 1300. During this period of old age the empire was pressed on all sides and its provinces devastated; the study of the arts and literature became extinct; the science of law consisted in quoting the ancient jurists and the imperial constitutions.

The various collections of these constitutions which appear during this period form our sources of information.

Principal jurists—Hermogenianus, Gregorianus, Tribonius and Theophilus.

This division has been adopted, especially by Mackeldey, in the historical introduction to his Manual; by M. Giraud, in his introduction to the study of Roman law; by Warnkoenig, in his history of Roman law; by M. Blondeau, in the chronological table with which his translation of the Institutes is concluded. Holtius reckons, as the first period, the time from the origin of Rome to the appointment of the urban prætor; the second, from the appointment of the urban prætor to Augustus; the third, from Augustus to Constantine. Marezoll, in his history of the sources of Roman law, treats the first as being from the foundation of Rome to the date of the XII Tables; the second, from the XII Tables to the Empire; the third, from the establishment of the Empire to Constantine; and the fourth, from Constantine to and including Justinian. This division, upon the whole, corresponds with our own. Puchta, in his historical sketch, which forms the introduction to his study of the Institutes, places the first from the foundation of Rome to the XII Tables; the second, from the XII Tables till the Empire; the third, from the Empire to Diocletian; and the fourth, from Diocletian to and including Justinian.

*List of the works of the Jurists from whose writings the
Pandects of Justinian were compiled.*

(This is the list annexed to the Florentine MSS. of the Pandects. It is doubtful whether it is identical with the Index compiled by order of Justinian. See § 20 under section 547.)

JULIANI.

Digestorum libri nonaginta.
Ad Minicium libri sex.
Ad Urseium libri quatuor.
De ambiguitatibus liber unus.

PAPINIANI.

Questionum libri triginta septem.
Responsorum libri decem et novem.
Definitionum libri duo.
De adulteriis libri duo.
De adulteriis liber unus.

Q. MUCII SCAEVOLÆ.

Opera liber unus.

ALPHENI.

Digestorum libri quadraginta.

SABINI.

Juris civilis libri tres.

PROCULI.

Epistolarum libri octo.

LABEONIS.

Posterior libri octo (upon probabilities).
Posteriorum libri decem.

NERATII.

Regularum libri quindecim.
Membranarum libri septem.
Responsorum libri tres.

JAVOLENI.

Ex Cassio libri quindecim.
Epistolarum libri quatuordecim.
Ad Plautium libri quinque.

CELSI.

Digestorum libri triginta novem.

POMPONII.

Ad Q. Mucium, Lectionum libri tri-
ginta novem.
Ad Sabinum libri triginta quinque.

Epistolarum libri viginti.
Variarum lectionum libri quindecim.
Ad Plantium libri septem.
Fideicommissorum libri quinque.
Senatusconsultorum libri quinque.
Regularum liber unus.
Enchiridii libri duo.

VALENTIS.

Fideicommissorum libri septem.

MÆCIANI.

Fideicommissorum libri sexdecim.
Publicorum libri quatuordecim.

MAURICIANI.

Ad leges libri sex.

TERENTII-CLEMENTIS.

Ad leges libri viginti.

AFRICANI.

Questionum libri novem.

MARCELLI.

Digestorum libri triginta.
Ad Leges libri sex.
Responsorum liber unus.

CERBIDII-SCAEVOLÆ.

Digestorum libri quadraginta.
Questionum libri viginti.
Responsorum libri sex.
Regularum libri quatuor.
De questione familiarum liber unus.
Questionum publice tractatarum liber
unus.

FLORENTINI.

Institutionum libri duodecim.

GAIL.

Ad Edictum provinciale libri triginta.
Ad Leges libri quindecim.
Ad Edictum urbicum libri decem.
Aureorum libri septem.

De actionibus.
 De concurrentibus actionibus.
 De intercessionibus fœminarum.
 De donationibus inter virum et uxorem.
 De legibus.
 De legitimis hereditatibus.
 De libertatibus dandis.
 De senatusconsultis.

TRYPHONINI.

Disputationum libri viginti unus.

CALLISTRATI.

De cognitionibus libri sex.
 Edictorum monitoriorum libri sex.
 De jure fisci libri quatuor.
 Institutionum libri tres.
 Quæstionum libri duo.

MENANDRI.

Militarium libri quatuor.

MARCIANI.

Institutionum libri sexdecim.
 Regularum libri quinque.
 De appellationibus libri duo.
 Publicorum libri duo.

EJUSDEM LIBRI SINGULARES.

De delatoribus liber singularis.
 Τροχουσιας liber singularis.
 Ad senatusconsultum Turpillianum
 liber singularis.

GALLI-AQUILÆ.

Responsa.

MODESTINI.

Responsorum libri novemdecim.
 Pandectarum libri duodecim.
 Regularum libri decem.

Differentiarum libri novem.
 Excusationum libri sex.
 De poenis libri quatuor.

EJUSDEM LIBRI SINGULARES.

De præscriptionibus.
 De inofficioso testamento.
 De manumissionibus.
 De legatis et fideicommissis.
 De testamentis.
 De eurementis.
 De enucleatis casibus.
 De differentia dotis.
 De ritu nuptiarum.

TARRENTINI-PATERNI.

Militarium libri quatuor.

MACRI.

Militarium libri duo.
 Publicorum libri duo.
 De officio Præsidis libri duo.
 Εισαγωγæ libri duo.

ARCADII.

De testibus liber unus.
 De officio Præfecti prætorio liber unus.
 De muneribus civilibus liber unus.

RUFINI.

Regularum libri duodecim.

ANTII seu FURII ANTHIANI.

Partis Edicti libri quinque.

MAXIMI.

Ad legem Falcidiam.

HERMOGENIANI.

Epitomarum libri sex.

GENERALIZATION OF ROMAN LAW.

THE IDEA OF THIS GENERALIZATION, AND, FIRST— ITS USES.¹

THE few preliminary remarks I have to offer here ought not to be passed over by the student, for whom this work is specially intended.

The study of Roman law, as of that of the legislation of any country, requires the application of the faculty of generalizing or taking a comprehensive view of the subject as a whole. For by this means the student is enabled to note the diverse nature of the various matters embraced in it, to trace their connection and to initiate himself into its spirit.

2. These general expositions, which are especially valuable to us in these days, it is too much the practice to overlook. Our method of teaching is ordinarily by exegesis, or the explanation of texts; and the student is abruptly introduced, without any previous preparation, to a number of maxims of universal application. With all these maxims, and all the matters to which they are related, he may be brought in contact without having formed a single idea respecting them.

Thus, for instance, the Institutes of Justinian form in France the basis of our instruction in Roman law, and con-

¹ I have not, without a reason, adopted this title of *Generalization*. The rules of the Roman Law are, for the most part, especially in the imperial constitutions and in the fragments of jurisprudence, contained in particular decisions of divers kinds: to extract them, a real operation of generalization is necessary. This operation is still more necessary, when one attempts, as I have done in this elementary work, to sum up in a few words

the history of legislation and the vicissitudes through which it has passed, exhibiting in respect to each event in succession the prevailing spirit of the time.

The sources and authorities having been carefully indicated in the body of the work as each part of the law is specially developed, I have for the most part abstained from quoting them in this section, wishing to avoid repetitions.

sequently they are the basis of this work. In the very first paragraph there is mention made of *obligationes*, *dominium*, *possessio*, *actiones*, *exceptiones*. These are all expressions quite unfamiliar to the learner, but if the study is commenced by imparting to him general ideas, the obscurity that involves the subject immediately disappears.

THE IDEA OF THIS GENERALIZATION, AND, SECONDLY—ITS SPIRIT.

3. The first rule we will begin with is, that Roman law must be studied as Roman law, in its aspect, its language, its genius. These laws are dead. The mind of the student therefore must carry itself back to the epoch in which they were in force, and thence descend the series of centuries down to our own time, noting as he proceeds the characteristic features of each successive epoch, but being on his guard against the tendency to view the past in the light thrown upon it by modern ideas,—a tendency all the more powerful from the necessity which exists of studying the subject by comparison, so as to distinguish clearly the characteristic peculiarities of every age. He must guard himself against the tendency to lay too much stress upon maxims and adages, upon distinctions, definitions and expressions which are traditionally set down to the account of Roman law, but which are completely foreign to it. The study for us is a historical study. Now, the first essential of history is truth.

THE ORDER OF GENERAL EXPOSITION.

4. The rule we have laid down as a governing principle must be applied even in the elucidation of those general ideas which are so necessary to a thorough understanding of the matter: for in this case we are not at liberty to exercise our own unfettered judgment in creating or selecting a method of analysis and philosophical deduction upon which the subject may be treated. Even in the consideration of general principles we must submit to the influence of ROMAN THOUGHT.

5. It is clear that we are more advanced than the Romans with regard to method. Take the principal monuments of their law, the Twelve Tables, of which we only know the order by conjecture, the Prætorian edicts, the Code of Theodosius, the Digest, and the Code of Justinian, it is difficult to trace in them any very methodical arrangement or any very logical connection.¹ As to the writings of their great jurists, which the genius of Cujas endeavoured to reconstruct, they have reached us in fragments so much scattered that it is difficult for us to judge how far the principle of uniformity governed them. That principle, which it is assumed by tradition rather than established by any clear proof they were careful to observe, is indicated in the Institutes of Gaius, followed very closely in the *Regulæ* of Ulpian, and adopted in the Institutes of Justinian, viz., the division of all law into that of PERSONS, THINGS and ACTIONS.²

Even this classification is not always regarded. And in the Digest it is reproduced, although there is no care taken about its subsequent observance.³

6. The modern German school is divided upon this point: some adhere to the Roman division, others have substituted for it a classification more philosophical and better adapted to the grouping of ideas, and which has generally been received, subject to certain modifications introduced by different authors.⁴

This last system, in which, moreover, we find little uniformity, has its advantages, especially in countries where, as in most of the German states, there exists no national codification, where the Roman law forms the basis of the existing legislation, and where it is studied as if still closely allied to the current system.

7. With us it is different. For us Roman law is a defunct system. It is our starting-point, whence we set out to study

¹ It is the same in the *Sententiæ* of Paul.

² Gai. 1, § 8; *Inst.* 1, 2, § 12.

³ Dig. 1, 5, *De statu hominum*, 1, f. Gai.

⁴ For a table of the classifications in vogue in Germany, see Mackeldey's

Manuel, §§ 206 and 207, pp. 135 and 136, of the translation (French), and the paragraph entitled, "On the divers systems of classification of the law," p. 387 of M. Savigny's treatise on Roman law.

historically the legislation of past times. To alter its classification is therefore to deprive it of a characteristic element. To give it one of modern creation is to clothe it in a costume which is altogether foreign to it.

We shall therefore remain faithful to our historical principle: without, however, following it so closely as to sacrifice the advantage which is gained by grasping the subject as a whole, by grouping analogous elements, and by making our own deductions. We shall allow ourselves the more latitude in our general exposition, seeing that the remainder of our work is devoted to the actual text of the *Institutes*; and that, moreover, the philosophical method, which commences the study by taking a comprehensive view of general principles, does not itself belong to the Roman system—it is modern.

We shall, however, carefully distinguish that which belongs to our method of exposition from that which really belongs to Roman law.

PART I.

OF RIGHT AND THE ELEMENTS OF ITS GENERATION.

PRELIMINARY ARTICLE.

SECTION I.—THE IDEA OF LAW.

8. The technical and rigorous formulæ of Roman law, at first a mystery monopolized by the aristocracy and used as a mere instrument of power, acquired by the progress of civilization and the advancement of science a totally different character. As the study of it became more general,—as it passed from the condition of a secret system monopolized by the patrician to that of a possession in which the plebeian might share,—as the pursuit of it became allied to the culture of letters and philosophy,—as it came to be modified by the influence of new customs and softened down by the annual edicts of the magistrate,—it underwent a complete transformation, and by the

opinions and writings of the jurists was reduced to a scientific system.

9. At the epoch when Roman law, which has been called written reason, was at its highest condition of development, it had ceased to be an inflexible system of absolute power; its basis was no longer authority, but reason: it had become the science of equity.

It is especially when taking this general grasp of the subject that we realize the extent to which the great Roman jurists built up the science of law upon that of philosophy.¹ Thus law, according to Paul, is that which is always equitable and just, "*quod semper æquum ac bonum est, jus dicitur.*"² According to the definition of Celsus, mentioned by Ulpian, it is the art of that which is good and equitable, "*jus est ars boni et æqui.*"³ The principle is always the same.

10. Of course these definitions have not the precision which we have at the present day the right to expect from metaphysical analysis: what is "the good?" what is "the equitable?" and has anything been done beyond employing one word in lieu of another?⁴ They do not contain a sufficiently clear notion

¹ Cicero commenced the movement in a great degree: "Non ergo a Prætoris edicto, ut plerique nunc, neque a XII tabulis, ut superiores," he makes Atticus say, in his treatise on the law, "*sed penitus ex intima philosophia hauriendam Juris disciplinam putas?*" Cicero, *De legibus*, 1, 5.

² Dig. 1, 1, *De just. et jur.*, 11, f. Paul. The jurist applies this definition to natural law: "*Ut est jus naturale.*" He adds, and opposes to it civil law, that which, in each city, is useful to all or to the greatest number: "*Quod omnibus aut pluribus in quaque civitate utile est.*" Thus the principle of the one is, according to this jurist, the good and the equitable, the principle of the other, utility.

³ Dig. 1, princ. f. Ulp.

⁴ Law is nothing else but a metaphysical conception, which our reason deduces from all relations between man and man, in which one has the faculty

to exact from the other an action or an inaction: a purely rational right, if these necessities of action or inaction are plain to us from reason alone—positive right, good or bad, if they are imposed on us, rightly or wrongly, by authority; the one has its standing point in reason, the other in power. Positive right, as opposed to rational right, is not really law.

There is no such thing as law in the contemplation of the jurist, except as between man and man (man taken collectively, as a people, a corporation, or taken individually). A branch of a tree broken by the wind wounds me, a wild beast tears me, a thunderbolt falls on my house, hail devastates my harvest: I shall not say my right has been violated. Bring in man, and the idea of action or inaction which is imposed upon men relatively, and you get a notion of law.

of the distinction between science as a knowledge of primary truths, and art as a collection of precepts deduced from science or practice. But there is none the less a revolution in the manner of interpreting the law by Roman jurists: for the principle of authority they have substituted that of reason: and already Cicero indicated the true principle when he said that, to explain the nature of law, you must seek it in the nature itself of man.¹

11. This empire of reason, of goodness and of equity as a constituent dogma of the law is reproduced in a multitude of the fragments of the Roman jurists, and has even passed into the imperial constitutions. Celsus, Julian, Marcellus, Paul, Modestinus, each invoke on occasion, even against the positively-established rule, the predominance of reason, of right, of the *bonum et æquum*;² and later, the emperors Constantine and Licinius, in one of their constitutions, announce the predominance as an incontestably accepted doctrine. "*Placuit* (it has pleased) *in omnibus rebus, præcipuam esse justitiæ æquitatisque quam stricti juris rationem.*"³

12. The profession of law, which has been thus characterized as the art of that which is good and equitable, has been invested by Ulpian with the sanctity of a sacerdotal system. "For we cultivate justice," he says, "the science of goodness and of equity, separating justice from injustice, that which is lawful from that which is unlawful, wishing to render men good, not

¹ "Natura enim juris nobis explicanda est, eaque ab hominis repetenda natura" (Cic., *De leg.*, 1, 5). "Nos ad justitiam esse natos, neque opinione sed natura constitutum esse jus" (Ibid.).

² "Quod vero contra rationem juris receptum est, non est producendum ad consequentias" (Dig. 1, 3, *De legib.*, 14, f. Paul). "In his quæ contra rationem juris constituta sunt, non possumus sequi regulam juris" (Ibid. 15, f. Julian). "Nulla juris ratio, aut æquitatis benignitas patitur, ut quæ salubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione

contra ipsorum commodum producamus ad severitatem" (Ibid. 25, f. Modestinus.). "Quod non ratione introductum, sed errore primum, deinde consuetudine obtentum est: in aliis similibus non obtinet" (Ibid. 39, f. Cels.). "In omnibus quidem, maxime tamen in jure æquitas spectanda sit" (Dig. 50, 17, *De reg. jur.*, 90, f. Paul). "Etsi nihil facile mutandum est ex solemnibus, tamen ubi æquitas evidens poscit, subveniendum est" (Ibid. 183, f. Marcell.).

³ Cod. 3, 1, *De judic.*, 8, constitut. Constant. et Licin.

of the Institutes. It is sufficient to say that in this work we confine ourselves principally to private law.

SECTION II.—IMMEDIATE CONSEQUENCES OF LAW.

15. After the first idea of law, the logical connection leads to the idea of its immediate consequences; these are the rights and obligations which it creates. In order to express this result the term *jus*, right, has been adopted. This term is frequently used in the plural, *jura*, rights; also, according to this acceptance a right, *jus*, is the power to do, to omit, or to require a given thing. In the first sense it was cause; here it is effect.¹ On this point, also, we find amongst Roman jurists traces of a principle of philosophical equity; that is, that no one should be allowed to exercise his right with the sole motive of injuring his neighbour, without having therein any interest.²

16. From these two principal acceptations of law, as cause and as effect, we pass on to the component elements of its generation.

SECTION III.—COMPONENT ELEMENTS OF THE GENERATION OF LAW.

17. These elements are three in number:—

1°. Persons (*personæ*), that is to say, men and abstract beings of pure legal conception, considered as susceptible of having and of owing rights.

2°. Things (*res*), that is to say, all corporate things and abstract objects of pure legal conception, considered as submitted, or capable of being submitted, to the wants, utility or pleasures of man, and therefore as susceptible of forming the object of rights.

¹ The German school says, that in the first case the word *jus* is taken in an *objective* sense, and in the second in a *subjective* sense, that is to say, relatively to the subject who is endowed

with the faculty, and liable to the obligation resulting from the right.

² Dig. 6, 1, 38, *in fine*, f. Cels.; 39, 3, 1, § 12, f. Ulp.

The Roman method had appreciated and distinguished these two primary elements: persons first, for, says Hermogenianus, it is for mankind that all law is established;¹ and, secondly, things.

18. But their deduction ended there; it was not complete. We have, it is true, in persons the active or passive subject of laws; in things, the object of rights; but law is not yet engendered. There is wanting the efficient cause, the generating cause, the cause which will give birth to rights, which will transmit them from one to another, modify and destroy them. This third element is—

3°. Events, facts, acts of man, judicial or non-judicial; that which involves the idea of time, of place, of intention, of form; all things which enter into the composition of human acts and deeds.

Unite and combine these three ideas: persons, the active or passive subject; things, the object; and events, facts, acts of men, the active cause; and rights are engendered, transmitted, modified and extinguished.

19. The notion of fact, the appreciation of events and of human acts, with regard to the generation and modification of rights, repeatedly occurs in Roman jurisprudence; it could not be otherwise, since the very nature of things exacts it, but the idea of it is not unfettered, classed apart and methodically treated.

This classification or theoretical individual development is the work of modern analysis. It is universal with the Germans.

20. It remains for us to give a few general ideas upon each of these.

¹ Dig. 1, 5, 1, f. Gai. and 2, f. Hermogenian.

I. OF PERSONS.

CHAPTER I.

COMPONENT NOTIONS.

SECTION IV.—IDEA OF PERSON.

21. The word person (*persona*) does not in the language of the law, as in ordinary language, designate the physical man.¹ This word, in law, has two acceptations: in the first, it is every being considered as capable of having or owing rights, of being the active or passive subject of rights.

We say every being, for men are not alone comprised therein. In fact, law, by its power of abstraction, creates persons, as we shall see that it creates things, which do not exist in nature. Thus, it erects into persons the state, cities, communities, charitable or other institutions, even purely material objects, such as the *fiscus*, or inheritance in abeyance, because it makes of them beings capable of having or owing rights. In the inverse sense, every man in Roman law is not a person; for example, slaves when considered as the property of the master, especially under the rigorous system of primitive legislation, because they are the object and not the subject of law:² this, however, did not prevent the Romans from including them in another sense in the class of persons.³

22. We shall therefore have to discriminate between and to study two classes of *personæ*. Physical or natural persons, for

¹ See it, however, employed in that sense by Ulpian, Dig. 50, 17, *De div. reg. jur.*, 22, f. Ulp.

² *Inst.*, 1, 16, § 4.

³ Roman law, though so rigorous, could not completely destroy the personality of slaves; because it is impossible for a human being to live in relation with other men without there being rights and duties from one to the other. Thus the slave was liable to punishment for his misdemeanors. Thus the faculty of being instituted heir, of being honoured with a legacy, and of obtaining the rights even for himself,

if he were a free man at the moment of their devolution; the faculty of being placed by his master over a business, to conduct any one operation, to manage his *peculium*; the capacity to take part in contracts or other proceedings calculated to acquire for his master obligations or real rights: all this constitutes a capacity in law which can only belong to a person. Lastly, slaves had rights even against their masters from the time when it was no longer allowed to put them to death, nor to make them undergo bad treatment.

which we find no distinctive denomination in Roman jurisprudence, except the expression taken from Ulpian, *singularis persona*, that is to say, the man-person; and abstract persons, which are fictitious, and which have no existence except in law, that is to say, those which are purely legal conceptions or creations.¹

SECTION V.—SECOND ACCEPTATION OF THE WORD PERSON.

23. In another sense, very frequently employed, the word "person" designates each character man is called upon to play on the judicial stage; that is to say, each quality which gives him certain rights or certain obligations: for instance, the person of father; of son as subject to his father; of husband; of guardian. In this sense, the same man can have several *personæ* at the same time. In this respect he resembles the mask in a comedy or drama—

"Personam tragicam forte vulpes viderat,"

says the fabulist.

" . . . Personæ pallentis hiatum

In gremio matris, formidat rusticus infans,"

says the satirical poet.²

CHAPTER II.

STATUS.

SECTION VI.—IDEA AND COMPONENT ELEMENT OF STATUS.

24. These elements are three in number—*Libertas*, *Civitas*, *Familia*. Their conjunction constitutes that which the Romans

¹ These expressions are not from the language of Roman law, though the difference between these two classes of persons is well defined. We find in Ulpian the expression *singularis persona* for natural person, in opposition to *populus*, *curia*, *collegium*, *corpus*. Dig. 4, 2, 9, § 1, f. Ulp.

² Phædr. fab. 7; Juvenal, 3rd satire, v. 174; and see the epigrammatic poet:

"Sum sguili lusui Rufi, persona Batavi:
Quæ tu derides, hæc timent ora puer."
(Martial, lib. xiv. 176.)

Add this phrase, so characteristic of Pliny: "Persona adjicitur capiti densusve reticulus" (Pliny, book 12, ch. 14). This is why they say, in the language of the law: *Sustinere personam*, to wear a mask, a person—*Hæreditas personam defuncti sustinet* (Dig. 41, 1); an inheritance in abeyance wears the mask, the person of the deceased.

called *status*, state—or *caput*, head¹—the state, the person of Roman civil law.

This word *status* is, in the language of Roman law, a technical word; and the student must especially remark the sense which there belongs to it, and which refers exclusively to these three elements—*libertas*, *civitas*, *familia*; for this has not prevented Roman jurists from often employing it in the common and ordinary acceptation. The same remark applies to the word *caput*.²

25. The study of persons, to be methodical, must be confined to the framework of these three elements: *liberty* first—next the *city*—lastly the family, with all the rules and institutions referring to each of them; and we shall then have before us the principal table of “persons” in the civil society of the Romans.



§ I. *LIBERTY* (*Libertas*).

SECTION VII.—LIBERTY—SLAVERY (*Servitus*)—COLONIZATION (*Colonatus*).

26. Liberty (*libertas*); and, for opposite idea, slavery, servitude (*servitus*): thence the first division of men into free (*liberi*) and slaves (*servi*; *mancipia*, taken with the hand).

During the period of primitive right, when it flourished in its pristine severity, the notion of servitude existed in its sternest form.

¹ For the last expression, see *Inst.*, 1, 16, § 4.

² M. de Savigny, in a special dissertation (Appendix 6, 2nd vol., of his treatise on Roman law), attacks certain rather too scholastic theories which have been formed in Germany on the *status*, which, by-the-by, we are not very well acquainted with. The language of the law, constantly mixed up with acts and objects of ordinary life, is, by its very nature, indefinite; the same words, especially when they are ordinary words, appear in varied acceptations, such as that of *status* in Roman law. Comprehensive and

flexible as it is, he who would restrain it within limits, and give it the stiffness of a technical expression, runs the risk of the charge of pedantry. But the criticism of M. de Savigny, correct from this point of view, could not get over this fact, that Roman jurists, while frequently employing the word *status* in a general and common sense, as we see for instance in the Digest, book 1, art. 5, *De statu hominum*, have used it also more particularly in order to designate the condition of man from the point of view of these three elements—liberty, Roman citizenship, family.

Later on, when, under the influence of stoicism, law had passed into the condition of a philosophical system, Roman jurists recognized and proclaimed, in the very definition which they gave of it, that *liberty* was the condition of nature, and servitude an institution *against nature*; but which was established by human law, by the general custom of nations.¹ The law, however, mitigated its severity, and brought it more into accordance with the dictates of humanity.

We shall find Christianity, subsequently coming in with its holy doctrine of equality of all men, further modifying the rigour of the institution, and gradually accomplishing its abolition.

The attention of the student should be fixed upon these three well-defined periods of Roman legislation.

27. In the early period of Roman law, this principle of liberty operated simply as a division of mankind into two classes,—the free and the slave. At the epoch marked by the decline of agriculture, and by the frequent abandonment of land for want of useful cultivation,—at the period especially when distant provinces were conquered and added to the empire, and hordes of barbarians permitted to settle on its territories, before Constantine's time, we observe that a third and totally new legal term came into vogue: the colonists (*agricolæ* or *coloni*), whether tributary (*censiti*, *adscriptii* or *tributarii*) or free (*inquilini*, *coloni liberi*); these were serfs not bound to a master individually but to an estate.² It is a gradation leading, as time goes on, from servitude to serfdom, and from serfdom to domesticity and to the condition of the *proletarii* of more modern times.

28. The problems which law at this point develops suggest the following questions:—

How is a man born free, how is freedom acquired, how lost?

¹ "*Libertas est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur. § 1. Servitus est constitutio juris gentium, quo quis dominio alieno contra naturam subijcitur.*" Dig. 1, 5, 4, f. Florentin.

² See above, § 435 et seq. See also amongst the fragments of the Theo-

dosian Code, for which we are indebted to the discovery of M. Amédée Peyron, a constitution of Honorius, which presents a similar establishment of Barbarians on the domains of the empire, under the condition of colonists. Cod. Theod. 5, 4, *De bonis militum*, const. 4.

How is a man born in servitude, how does he come into this condition, how is he freed from it?

How is a man born a colonist, how may he become one, how does he cease to be one?



SECTION VIII.—ENFRANCHISEMENT (*Manumissio*)—FREE MEN (*Ingenui*)—AND ENFRANCHISED SLAVES (*Liberti*, *Libertini*).

29. Here we come upon the theory of enfranchisement (*manumissio*), in which it is necessary to remark the change of character which is revealed even in the variations of the form under which it was effected. Under the primitive Roman law enfranchisement was a political act. The state must intervene as a party, for it was a question of making a citizen. Then, like so many other institutions originally political, enfranchisement became gradually to be a simple exercise of private right, when, on the one hand, the title of citizen, which it conferred, had lost its value, and, on the other hand, the spirit of the legislature tended to multiply the number of enfranchisements, and to extend their effects.

30. As a result of *manumissio*, or enfranchisement, there followed another division of persons,—the free (*ingenui*), who were so from their birth, and the enfranchised, who only became free by their enfranchisement. The latter were called *liberti*, in relation to their patron, and *libertini*, when their condition alone was designated.



SECTION IX.—SUCCESSIVE MODIFICATIONS IN THE CONDITION OF THE ENFRANCHISED.

31. The condition of the enfranchised, especially in early Roman law, was very different from that of the free man, both in relation to the *jus publicum* and the *jus privatum*. On the one hand, in the primitive law one class only of enfranchised was recognized,—they were all Roman citizens, though of an inferior order. Under Augustus and Tiberius two new classes,

not having the right of citizenship under the former, and one under the latter, were introduced, that of the *Latini juniani*, enfranchised Latins, and that of the *dedititii*. Finally, Justinian raised all to the same rank; all became citizens. It is the primitive law in its simplicity, but extended to private enfranchisements under the *jus privatum*, which the former system would not have recognized. On the other hand, the condition of enfranchised citizens had steadily tended to assimilate itself with that of the *ingenui*, and to place itself on a level with it. Under the empire, and the operation of the later *Novellæ* of Justinian, it only differed from it by the tie of, and the right derived from, patronage.



§ II. CITIZENSHIP (*Civitas*).

SECTION X.—CIVIS, PEREGRINUS, HOSTIS, BARBARUS.

32. The word “city” recalls to us the *Civis sum Romanus*, which in itself signified so much. Nowhere has the idea of the “citizen” been so thoroughly and forcibly developed as in the primitive law of the Romans. So clear and vigorous a conception of what the rights of citizenship really are, never existed elsewhere. The expression has lost much of its force in modern times.

The expression *Jus Quiritium*, in its ancient and characteristic designation, that of *optimum jus civium Romanorum*, afterwards *jus civitatis*, *jus civile*, describe this right,—a privilege exclusively confined to the city as regards territory, to citizens as regards their *status*.¹

This title of citizen had impressed on family ties, on marriages, on property, on inheritances, on testaments, on alienations, on engagements, in short, on all Roman institutions, a character of force and vigour which regarded neither the voice of nature nor the ties of blood, nor the ordinary instincts nor principles of equity, and was one to which a stranger might in vain aspire.

¹ This synonym between *Jus Quiritium*, the ancient designation, and *Jus civitatis*, the more modern term, can be seen in the *Regulæ* of Ulpian, tit. 3,

§§ 1, 2, et seq., and in Gaius, 3, §§ 72 and 73, and also in the passage of Livy which we have before quoted.

The title was indelible in the pure law of the Romans, when once acquired: for the sentence of the people could deprive a citizen of life, but never of the rights of citizenship without his consent.¹

The exercise of all civil rights, both as regards the *jus publicum* and the *jus privatum*, depended on this title. If it were not there, there was no *status*.

33. The opposite of *civis*, citizen, is *peregrinus*, the alien—*hostis*, the stranger or enemy—for to republican Rome, till she had completed the conquest of the known world, these two words were synonymous²—*barbarus*, the barbarian.

Peregrinus, *hostis*, *barbarus*, as far as civil rights went, were upon the same footing. Such persons were strangers; none of them had any participation in the rights of citizenship, but each word implied the idea of a different relation towards Rome. *Peregrinus* was, in its most limited sense, the foreigner at Rome, whom curiosity, love of travel or of study, business, or the absorbing power of the great city, had brought there, or who had settled there. Their affluence might increase day by day, their number might equal, if not surpass, that of the citizens, still they continued strangers to the institutions and rights of citizenship. A special prætor, the foreigners' prætor (*prætor peregrinus*), was appointed to administer justice for them, not according to the forms and principles of the *jus civile*, but according to the *jus gentium*, rights common to all men. More generally the expression *peregrini* designated all who were subject to the government of Rome, without belonging to the republic.

Hostis was the foreigner whom Roman power had not yet subjugated; till that subjugation, he remained an enemy.

Barbarus was he who was still outside the limits of civilization and of the Roman world. The circumference widened every day. From the Cisalpine Gauls, this title passed to the Gauls on the further side of the Alps, from the borders of the

¹ "*Civitatem vero nemo unquam ullo populi jussu amittet invitus.*" Cic., *Pro dom.*, c. 29, 30. In order to inflict this loss, they had recourse to

subtleties and subterfuges, so common in Roman jurisprudence.

² See the law of the Twelve Table: *Adversus hostem æterna auctoritas.*

ocean to the islands of Great Britain, to the forests of Germany, and to the unknown hordes of the North and of Asia, which were destined to overthrow the empire.

But the condition of all, as to the enjoyment of civil rights, was the same—they were strangers. So, in law, the expression *peregrinus* sufficed to describe that condition. In time, it came to have a more general sense, especially when Rome had conquered nearly all the known world, and it ended in being alone employed by jurists, in the most modern legal language, to express the opposite of *civis*.

34. How was a man born with the character of citizen? How was it acquired? How was it lost?

Two remarkable changes should be noted here in the historical progress of Roman law.



SECTION XI.—SUCCESSIVE COMMUNICATION OF THE *JUS CIVITATIS* TO PERSONS WITHOUT THE PRECINCTS OF ROME.

35. In the first place we have to remark the subdivision, the partial or total communication of the *jus civitatis*, and its gradual extension. Under the primitive law, a person was a citizen or a foreigner; there was no intermediate status. Subsequently particular concessions, whether of grace, whether wrested by arms, or conferred under treaties, were made to the inhabitants of certain territories. Some privileges of this *jus Quiritium*, or *jus civitatis*, were distributed more or less extensively by the sovereign state, and in after times by the emperors alone, to nations, or even to individuals, and in some cases to kings who solicited them.¹

This grant took effect in two ways, it being made either with reference to the soil or to the person. We confine ourselves here to the latter.

36. Thus persons might be admitted to a greater or less participation in the *jus Quiritium*, sometimes in their public

¹ Gai. 1, §§ 93 and 94.

and private relations, at once including eligibility to the offices of the republic and the right of suffrage—*jus honorum*, *jus suffragii*—sometimes in private relations only.

In the concession of this privilege as regards the *jus privatum*, the different rights of the *jus civitatis* were occasionally distinguished in a remarkable manner: thus the *connubium* gave the grantees the capacity to contract amongst themselves, or even with Roman citizens, *justæ nuptiæ*, or marriages, followed by the effects of the *jus civile*;¹ the *commercium* carrying with it the capacity of forming contracts, making acquisitions or alienations according to the *jus civile*;² the *factio testamenti*, or the capacity of receiving from citizens, or of disposing in their favour by testament according to the Roman law, which would appear to follow, not indeed necessarily, but ordinarily, from the *commercium*, since the testament was clothed in the factitious guise of a solemn sale, a *mancipatio*.³

These dismembered elements of the *jus civitatis* were granted together or separately; thus the citizens of a town might enjoy, for instance, the *commercium* without the *connubium*; all depended upon the form of grant.

Thence arose an irregularity in the extent to which the *jus civitatis* was conferred, whether in the matter of *jus publicum* or *privatum*. A person might be no longer absolutely, as under the strict and primitive legal system, either purely a citizen or purely a stranger; there came to be more than one intermediate position.

37. The towns of Latium, of Italy, and of the distant provinces, successively obtained their share in these concessions; and the question of the origin, of the interior organization of each city, and of the nature of its relations with Rome, is closely bound up with this subject.

Here, confining ourselves to the status of the inhabitants, as persons, without any reference to the soil, we find the following classes: 1st, Roman colonists (*Romani coloni*, or simply

¹ Gai. 1, § 56.

² Ulp., *Reg.*, 19, § 4. "Commercium est emendi vendendique invicem jus"

(Ibid. § 5). *Connubium*, de *nubere cura*; *commercium*, de *mercari cum*.

³ Ulp., *Reg.*, 20, §§ 8 and 22, § 3.

coloni); 2nd, Latin allies (*socii Latini*, or simply *Latini*); 3rd, *Latini colonarii*, or Latin colonists; 4th, *Latini juniani*, or those belonging to an inferior class, enfranchised and assimilated in nearly everything to the *Latini colonarii*;¹ 5th and lastly, The *dedititii*, and the enfranchised who were assimilated to them.

Optimum jus is the *jus civitatis* in all its plenitude.

38. But under Antoninus Caracalla all these shades of distinction as to persons disappeared, and all subjects of the empire were pronounced Roman citizens. The only vestiges of the ancient distinction that then remained were the two inferior classes of enfranchised—the *Latini juniani*, and the *dedititii*, who continued if not in reality, at least by legal conception, to be distinct down to the time of Justinian, who ended by suppressing the distinction. Thenceforward the *peregrini* were simply enemies and barbarians, the sense of the word being distorted.

SECTION XII.—GRADUAL ALTERATION OF THE CIVIL LAW.

39. The second class of facts to which the attention of the student should be directed, and which runs parallel to the preceding, is, that just as the title of *civis* was communicated and propagated, the real civil law underwent a progressive approximation to the *jus gentium* by means of subtleties and legal fictions, imperial or prætorian institutions, till, finally, under Justinian, its primitive character almost totally disappeared.

§ III. *FAMILIA*.

SECTION XIII.—GENERAL IDEA OF A ROMAN FAMILY.

40. The *familia*, in the aristocratic and theocratic constitution of the Roman state, was the particular aggregation of

¹ Gal. 3, § 56. Fragment, *De manumissionibus*, preserved by Dositheus, § 6, and following another division, § 8. They had the *Commercium*, Ulp., *Reg.*,

19, § 4. See also Gaius, 1, §§ 66 et seq. But not the *Connubium*, Ulp., *Reg.*, 5, § 4.

persons which formed the unit, if it may be so expressed, of the *jus publicum*, the *jus sacrum* and the *jus privatum*.

41. The *jus publicum*. The patrician families were predominant. Each of them comprised within its sphere the plebeian families attached to it by the political and religious tie of clientage. Those plebeian families which remained unattached by this tie of clientage were isolated, without importance in the state and without support, but they formed the nucleus around which plebeian influence centred in its contest with the patrician.

The alteration of families was an affair which concerned the whole community; it was consequently effected in the *comitia*; the formalities by which it was effected continued in use down to a late period as mere forms, but, as such, indications of the ancient system.

42. The *jus sacrum*. The *familia* was connected by the union of a worship peculiar to itself; by the bond of sacrifices to be made at certain times and in certain places (*sacra familiæ; sacra gentis*). Apart from the *lares* or household gods, it might be bound to the especial *cultus* of a particular deity, such as Hercules, Minerva, or any other.¹ The religious character of the aggregation also necessitated the intervention of pontifical law and power, when there was a question of altering the family.

43. The *jus privatum*. The family, considered with reference to the *jus privatum*, was the aggregation in which property, the effects of obligations, the right of inheritance, and of succession, that is to say, the right of taking and of continuing in the state the *persona* of the deceased, all centred. To transfer this right to another the intervention of the entire community, that is, of the *comitia*, became necessary.

¹ Such, for instance, are the expiatory sacrifices of the Horatii for the murder of their sister, "*Sacrificia piacularia gentis Horatiæ*" (Livy, 1, 26). Such

are those by the Fabii to Hercules on the Quirinal Mount (Livy, 5, 46), and those of Nantius to Minerva (Dion. 6, 69).

44. These primitive characteristics gradually died out. The political aggregation disappeared with the modifications which the constitution underwent. Religious aggregation went out with paganism. The *jus privatum* superseded the *jus publicum*; but it is only by a reference to antiquity that we can explain certain traces that remained permanently in the law.

SECTION XIV.—THE BASIS OF THE ROMAN FAMILY.

45. The foundation of the family, in human law, in the general law of society, is marriage. Among the Romans the civil marriage was certainly an important element in it; but its root and origin are to be sought elsewhere.

The Roman family, even as regards the *jus privatum*, was not a natural family; it was a creation of the *jus civile*, the *jus civitatis*. Woman, as a wife to her husband, or as a mother to her children, was not comprised in it by the single fact of marriage: she gave it children, but she was not of their family. The children themselves, their descendents, could be foreign to it; and, inversely, persons foreign by blood could form a part of it.

And, nevertheless, on the fact of existence in the same family depended all civil rights which the members were entitled to enjoy with regard to one another. Whoever was in it participated in these rights. Whoever was not in it, whether son, father, mother, brother, sister, no matter in what relation he stood, had no participation whatever.

The tie of family was not the tie of blood; it was not the tie produced by marriage and by generation, but a bond created by civil law—a bond of power. The exposition, therefore, of the law which concerns marriage must commence with the theory of power.

SECTION XV.—POWER—THE CHIEF OF THE FAMILY (*Paterfamilias*)—PERSONS *Sui Juris* OR *Alieni Juris*.

46. This idea of power as the basis of the Roman family must be taken in its most absolute, most despotic sense. A

single individual, the head, was the master, the proprietor of all the others, of all the patrimony; the property concentrated in each family was at his free and entire disposal; body and estate, all were his. As for himself he was independent.

47. Thence arises, with regard to the family, a new division of persons.

1. Persons *sui juris*, having their own rights, also called *paterfamilias* when men, *materfamilias* when women. Married or unmarried, with children or without, even in infancy, from very birth, if not subject to any power, the Roman citizen was *paterfamilias*—the father—the head of the family.

2. Contrasted with the *sui juris* is one who is *alieni juris*, an accessory of another, *alieno juri subjectus*, that is to say, under the power of another.

48. The first alone could have, could acquire, could exercise civil rights, and hold other persons under his power. The second, strictly speaking, could hold, acquire or exercise no right for himself; he was only the representative, the instrument of the one on whom he depended, he could have no one in his power; in a word, he had no *persona* of his own, but bore that of the chief. His individuality was extinguished under this mask, or *persona*. If he was reputed to be a part, so to say, of the family, it was only by identifying himself, by making one person with the head, that he could be considered to be so. All this had reference to the status of the individual in his private relations only, for carry him into public life and we see him in the *forum*, the *comitia*, in the ranks of the magistrates, the man *alieni juris*; if he was free and a citizen he there enjoyed his independence, and exercised the rights and public duties of a citizen.¹

¹ There is no doubt, however, especially under the primitive constitution of Rome, that the principle of the all-absorbing personality of the head exercised its influence even with regard to political relations; and the incontestable proof of it is in the *comitia centuriata*, where the citizens were

ranked according to wealth. Now the sons of the family had absolutely nothing, unless it was their participation in the common property of family, as uniting in the person of their chief. Up to what point did the son of the family, in his political relations and in the discharge of his duties as citizen,

SECTION XVI.—DIVERS KINDS OF POWER (*Potestas, Manus, Mancipium*).

49. The power of the individual who was *sui juris*, *paterfamilias*, head of the family over persons *alieni juris*, was of three kinds:—

1. *Potestas*—power properly so called which designates at the same time, in the language of Roman law, the power of the master over the slave (*potestas dominorum*), and the paternal power of the father over the children (*patria potestas*).

2. *Manus*—the hand; a symbolical expression sometimes, and probably always originally so, employed to designate all power,¹ but especially applied to the power of the husband over his wife in cases where the latter was subject to him, which did not always happen, and which was not the result of marriage alone.

3. *Mancipium*—the power over the free man of whom Roman ownership had been acquired by the solemn alienation or civil sale, named mancipation (*mancipatio*).

Thus the persons under the power of the head of the family were slaves, children, the wife when she had been placed or had fallen *in manu*, and the free men he had acquired by mancipation; this did not prevent their remaining free in other respects.

50. In respect of each of these powers, the law had to regulate the following points: the way in which it was produced or acquired, its effects and extent, and the way in which it was dissolved.

51. As to power over slaves. The theory of its acquisition is the same as that of the acquisition of things, because slaves, in this relation, are things. The extent of this power, and its effects, are matters especially of historical study; and the mode in which the dissolution of this power was effected, by enfran-

continue to wear the legal mask, the *persona* of the chief? It is an intricate question, but out of the pale of this work, which is specially devoted to the

jus privatum.

¹ For instance, in *manumissio*, *mancipatio*, and *mancipium* itself.

chisement, *manumissio*, is closely bound up with the theories of *libertas*, of *civitas*, and of the *familia*. And connected with it is the theory of patronage and of the ties thereby produced between the enfranchised and the enfranchising family.

52. *Patria potestas*.—This power rested upon the theory of *justæ nuptiæ*, and involved that of arrogation, which belonged to the *jus publicum*; inasmuch as it affected the status of all citizens and required the intervention of pontifical power, since it involved an alteration in the composition of the family. With the *patria potestas* was also connected adoption, which was an innovation on the *jus publicum* by the *jus privatum*, by the aid of a fiction. As in the former case, the extent and effect of this power, both in relation to persons and things, was materially altered by the influence of time. Its extent was not limited to the immediate family, but it passed through the male line from generation to generation, and was alone terminated by the death of the head of the family, that is to say, except in cases where it was brought to an end by any special circumstance.

Amongst those special circumstances were the *mancipatio*, which was not provided for by primitive law, nor even by the law of the Twelve Tables,¹ and which was in fact arrived at by means of fictions. It is remarkable that Roman law, which was essentially aristocratic, recognized no right of primogeniture, nor preference of sex. The equality of children was recognized from the earliest times, and both sons and daughters directly under the control of the chief became, by his death, both free and *sui juris*.

53. *Manus*.—The theory of *manus* involved the notion of *justæ nuptiæ*, not indeed as an efficient cause but as an essential condition, because it was necessary to this power that it should be generated by the *confarreatio* or *farreum*, a sacerdotal solemnity of Etruscan origin, and a privilege confined to the patricians; or by *coemptio*, which was the civil sale of the woman by *mancipatio*, a solemnity practised by the plebeians;

¹ See however Gaius, 4, § 79.

or finally by *usus*, which was the acquisition, as a result of use, which followed from the uninterrupted possession of the woman for the space of one year. The effects of this power were chiefly to place the woman in the family of her husband, to give her the rank of daughter of her own husband and sister of her own children.

54. *Mancipium*.—This involved the notion of the sale and of the civil alienation (*mancipatio*), which could be made by the head of a family either of the children, or of a female under his power, when transferred for the purposes of marriage (*noxali causa mancipatio*). The effects of this power were in general to assimilate the condition of the person emancipated to that of a slave in the family (*servorum loco constituuntur*), leaving the person at the same time free as to the *jus publicum*. In this were involved *manumissio*, by which an end was put to this condition of subjection, and the relationship, analogous to that of patronage, which resulted from it. As in the preceding cases, this power also gradually decreased, and *mancipium* ultimately became nothing but a fictitious means of completing the emancipations which did not comport with the civil law.¹ Notice must also be taken of a singular rule connected with this subject. Every fifth year at each census all who were in *mancipio*, rather as a fiction than in fact, necessarily recovered their liberty.²

55. To this power (which is designated by Gaius *mancipium*) the condition of the person styled in primitive times *nexus*, *nexu vinctus*, corresponded, that is to say, the condition of the head of a family who, being a debtor, in order to secure his debt gave himself in pledge to his creditor by the civil sale *nexum*, *mancipatio*, *alienatio per æs et libram*, which involved, not only his own person, but that of all the members of his family and his entire patrimony.² Emancipation in such a

¹ For example, to emancipate the sons from paternal power; to liberate women from the guardianship of their agnates.

² Gaius, 1, § 140.

² *Nexum* was a primitive and generic expression: it designated all civil acts which were accomplished by the real or fictitious employment of alienation; *per æs et libram*, by the bronze piece

case as this was not considered, and probably was not in fact (as a certain restriction was placed upon the terms implied in the transaction), an irrevocable alienation, but was regarded rather in the light of a guarantee or as an alienation which would *ipso facto* cease by the payment of the debt.¹ Debtors thus liberated from this subjection by payment were in the language of ancient Roman law called *soluti*.² *Nexi, soluti!* These explanations recall to mind the miserable condition of the plebeian, oppressed by the usurious patrician, the cause of constant revolts; and the *lex Petillia Papiria*, B.C. 326, which prohibited this practice.

56. It is also to the power which could be enjoyed by the head of a family over free men, and acquired by means of the civil law, that we must refer the condition of those who were styled *addictus*, that is to say, of those who by declaration of the magistrate were declared to be under the power or control of another, whether of a creditor from default of payment or of an injured person, as the result of an offence committed against him; for example, a case of *furtum manifestum*.³ Notwithstanding the similarity between the condition of the *nexi* and the *addicti*, the real difference was considerable; the *nexi* were really assimilated to slaves, both in fact and in law, in relation to the person to whom they had been sold, though they remained free as to the state; whereas the *addicti* were slaves in fact but not in law, both in regard to the creditor to whom they had been *addicted* and to the state.

and the balance ("*Nexum est, ut ait Gallus Ælius, quodcumque per æs et libram geritur, etc.*") Festus, *vº Nexum*; Cicero, *Top.*, 5, 28, and Boetius ad Cicero.; Cicero, *De orat.*, 8, 40; Varro, *De lingua latina*, 6, 5). The expressions *mancipium*, and later still *mancipatio*, were more recent and more comprehensive.

¹ "*Liber qui suas operas in servitutem, pro pecunia quam debebat, dabat dum solveret, nexus vocabatur.*" Varro, *De lingua latina*, 6, 5. "*Propter domesticam ruinam et grave æs alienum, C. Plotio nexum se dare coactum.*" Valer. Maxim. 6, 9. Festus,

vº Deminutus. It was thus possible, by the formality of the nexum, to give a pledge as guarantee of the debt in property instead of the person.

² "*Nexo solutoque . . . idem jus esto.*" Festus, *Sanates*. That is to say, that the *nexus*, during his engagement and so long as the term of payment had not arrived, was entitled to the same rights as one who was free from this engagement. Livy, 2, 23.

³ Aul. Gell., *Noct. attic.*, 20, 1, wherein is found the text of the law of the Twelve Tables. Quintil., *Instit. orat.*, 3, 6; 5, 10; 7, 5. Livy, 6, 36.

The expressions *adjudicatus*, *judicatus*,¹ which signified the result, not of a magistrate's declaring the law, but of a judge's delivering judgment,² referred to the status preceding the *addictio*; they designated one who had been condemned (*judicatus*) by the sentence of a judge, and who was still proceeded against by his creditor in order to have him made *addictus*; in the interval, therefore, between *judicatus* and *addictus* he was subject to a certain species of power which his creditor possessed over him.

57. These three kinds of subjection, resulting from *mancipatio*, the *nexum* and the *addictio*, applied to free men, and though varying as to their extent and to their details, they were the same in this important particular, that there was in each a power of appropriation, which, in the two former, conferred the actual Quiritarian *dominium*. The last two disappeared,—first the *nexum* and then the *addictio*. Gaius scarcely alludes to them, but he speaks in detail concerning the *mancipium*, which however in his time had commenced to be nothing but a fiction, and which, even when it existed in fact, was greatly modified in its effects.³



SECTION XVII.—MARRIAGE (*Justæ Nuptiæ*) AND THE VARIOUS
UNIONS BETWEEN THE SEXES (*Concubinatus*, *Stuprum*, *Contubernium*).

58. The theory of marriage, as a constituent element of the Roman family, was only an accessory of the *potestas*.

Roman marriage, according to the civil law, was styled *justæ nuptiæ*, *justum matrimonium*; the husband was called *vir*, the wife *uxor*. This institution was exclusively confined to citizens, or to those to whom the *connubium* had been ceded. It was the only marriage which conferred the *patria potestas*; it did not of itself however produce the marital power (*manus*) as to the wife; in order to secure this, there must have been, in addition, the *farreum*, the *coemptio*, or the *usus*.

¹ Gai. 3, §§ 189, 199; Dig. 42, 1, 34, f. L. Ruf.

² See post, § 247.

³ Gai. 1, § 141.

59. Here must be noted the division of the populace into two radically distinct castes, between the members of which a Roman marriage could never take place, because, as between them the *connubium* being non-existent, the *familia* could not be formed, nor could the blood of the two intermingle. In the course of time this distinction gave way; the *Lex Canuleia* conferred the *connubium* on the plebeians in B.C. 445,¹ and the *Lex Papia Poppæa*, A.D. 9, permitted the union of *ingenui* and the enfranchised:² the constitution of Justinian, in the spirit of Christianity, permitted the union of the senatorial order with the enfranchised and lower grades;³ and this emperor, in his own person, set the example to his subjects by raising a woman who had played a conspicuous part in the circus and in the *embolum* to share his throne and bed. We have thus before us the point of departure and the condition at which affairs arrived under the empire when distinctions had been obliterated. It was then no longer a question of the intermingling of the blood of a Roman citizen with that of a foreigner, for at that epoch it was impossible to say who was a foreigner, who a citizen, or who a Roman.

60. The form of marriage was purely a matter of private law; it did not require any public solemnity, but ranked with all ordinary real contracts; the only necessary conditions being consent and the tradition or transfer of the woman to her husband. This plain and simple theory of marriage was however supplemented, in accordance with the tastes and manners of the times, by forms and ceremonies, some symbolical, others ornamental, but neither having any legal effect. But with the patricians the case was different. Marriage with them was not allowed to remain an unceremonious and simple contract, but was attended with the Etruscan sacerdotal solemnity of the *farreum* or *confarreatio*; this, however, did not in itself constitute the marriage, but it had the effect of placing the woman *in manu*, that is to say, it made her, so to speak, a chattel in the hands of the head of the family, and it conferred upon the

¹ Livy, 4, 6.

² Livy, 29, 19.

³ Cod. 5, 4, 23; Novel. 89, c. 15; Novel. 117, c. 6.

issue the right to participate in pontifical functions. As to the plebeian, if he wished to place his wife *in manu*, he could accomplish this by means of the civil sale *per æs et libram*, or in default of this, by the uninterrupted possession of her body for the space of one year: that is to say, if she had not slept away from his house for three consecutive nights during that period (*usurpatum ire trinactio*).

With the theory of marriage is closely connected that of betrothal (*sponsalia*), which preceded it, and that of repudiation by divorce, which dissolved it (*repudium, divorcium*).

61. The other kinds of union between the sexes, not affecting the civil family, were *concubinatus*, *stuprum* and *contubernium*.

Concubinatus, or concubinage, was a licit intercourse without marriage. This union was permitted; but was not considered honourable, especially in respect of the woman. The issue of such a union, termed *naturales liberi*, had a recognized father; but they were not under the *patria potestas*. To this institution was attached that of *legitimation*, by means of which the *patria potestas* might be acquired over the issue.

Stuprum was a general expression, designating all illicit intercourse, the issue of which were termed *spurii, vulgo quæsiti*, and had no recognized father. As distinctive forms of this union, we may specify incest (*incestus*), adultery (*adulterium*), which made the issue *incestuosi, ex damnato coitu*, or *adulterini*.

Contubernium was the union of slaves, or of a slave with a free person, and produced no civil effects.¹

SECTION XVIII.—COGNATIO, AGNATIO—GENS, ADFINITAS.

62. The Roman word *parens* is derived from *parere*, to generate.

¹ This however does not prevent our finding a few provisions of the *jus civile* upon this kind of intercourse, especially

with regard to the status of children born from the intermixture of slaves and free. Gai. 1, §§ 84, 85.

The most comprehensive term indicating this relationship is *cognatio*.

63. *Cognatio* was the bond existing between persons united by the same blood, or who were reputedly so united. In the first instance the relationship was natural, in the second it was purely legal and was the result of adoption; persons so connected were, as between themselves, termed *cognati*, *quasi una communiter nati*.

Cognatio admitted of different degrees. The *linea recta*, or direct line, comprehended the whole series of persons who were derived directly the one from the other: and it was divided into the superior and the inferior; the former comprehending ancestors, the latter descendants. The collateral line, or the *linea transversa*, *obliqua*, *ex transverso*, *à latere*, included persons who were descended, not from one another, but from the same common stock. Each generation was a degree, the position of the degree determining the measure of cognation.

Mere cognation, whether the result of *justæ nuptiæ* or of any other form of union, did not place the individual in the family, nor did it confer any right of family; it had indeed scarcely any civil effects, unless it was the prohibition of marriage between certain parties.

64. The civil parentage, which produced civil effects and which conferred the rights of family, was *agnatio*; it was the bond which united the cognate members of the same family, *qui ex eâdem familiâ sunt*, and the active principle of this union of *ad-gnatio* was the *patria potestas*, or the marital power which united, or which would unite, all under the common chief, supposing the original head of a family still to be in existence.¹ He who was subject to this power was an agnate and a member of the family; whoever was without its pale was no longer so, and this applied equally to male and female.

¹ According to another opinion, which has been discussed more in detail and refuted by M. Ortolan in vol. iii., *Explic. hist. des Instituts*, lib. iii. tit.

2, § 1, the agnates were only those who had really lived in subjection together to the power of the same chief. *Qui sub unius potestate fuerunt.*

65. In addition to this family aggregation of all the agnates, there was originally another kind of civil union, that of the *gentilitas*, or, in other words, the generation or genealogy—a union the exact nature and origin of which are somewhat uncertain, though an immense number of ingenious but doubtful theories have been floated concerning it.

In our opinion a right conception of clientage and of enfranchisement is necessary in order fully to understand this relationship, which was peculiar to Quiritarian civil law. Citizens who were derived from a common source, whose lineage was free from all taint of servitude or subjection, and who consequently had a *generation* or *genealogy* of their own, and who were at the same time united by the bond of civil parentage, constituted a *gens*, and were, as to each other, both *agnati* and *gentiles*.

Viewed in this light, it is not clear wherein *gentilitas* differed from *agnatio*, unless it was in the essential constituent element of *gentilitas*, the freedom of the lineage from all taint of vassalage, which would have confined *gentilitas* to the patricians, whereas *agnatio* might be common to patricians and plebeians. In this way, and in primitive times, *gentilitas* would be the *agnatio* of patricians, the *gens* being the patrician family. But, in addition to this, the patricians, at the same time *agnati* and *gentiles* as between themselves, were also the *gentiles* of all the families of their clients or enfranchised, who were civilly derived from their *gens*, who had taken their name and adopted their *sacra*, and to whom their *gens* served as a civil genealogy. These descendants of clients or enfranchised, though having *gentiles*, were not themselves the *gentiles* to others, and therefore, in relation to them, *agnatio* was altogether different from *gentilitas*. Their *agnatio* was founded upon the common bond of the parental or marital power, however ancient the origin of that power might be. The *gentilitas* depended upon the bond of power or the influence of patronage, whether as clients or as enfranchised, however remote may have been the origin of this power.

In this way the title and the rights of *gentiles* would, according to our view, belong to the civil members of every race, in

its origin and during its existence strictly *ingenuus* or free from any taint of vassalage, first as between themselves, and secondly as to the race of clients or enfranchised throughout their various ramifications: all of whom bore a common name. The expressions *gentilhomme*, *gentiluomo*, *gentilhombre* and *gentleman* have been retained in the modern languages of Europe, and have been used to indicate what is commonly termed a good extraction, a noble genealogy, a pure blood. The law, in default of agnates, gave the inheritance and tutelages to the gentiles. This right and this bond of union, though existing at the time of Cicero, had entirely fallen into disuse in the time of Gaius.

66. In brief, the civil or natural ties of the Romans were expressed by the three characteristic terms *familia*, *gens*, *cognatio*. In the first we have *agnatio* and the *agnati*; in the second the *gentiles*; and in the last the *cognati*. The first two were Quiritarian, and depended either upon the existence of the *patria potestas* between the parties, or upon the relationship of patron and client, actual or enfranchised. The third rested solely upon the ties of blood, and consequently produced no legal effects.

67. *Affinitas* was the tie resulting from *justæ nuptiæ*, which affected both the contracting parties and their *cognati*. Properly speaking it had no degrees; it was, however, measured like cognation and by cognation.¹ Every relation of one of the married couple was related in the same degree to the other.

Affinity, like mere blood relationship, could not place one in the family, nor confer any right.



SECTION XIX.—DIFFERENT ACCEPTATIONS OF THE WORD *Familia*.

68. From the preceding observations, we are in a position to understand the principal acceptations of the word *familia* in the language of Roman law.

¹ Dig. 38, 10, 4, § 5, l. *Modest.*

1st. In its most limited sense, *familia* designated the chief, and the women and children under his power.

2nd. *Familia*, in a more extended sense, designated the connection of the agnates, all the members of the different families which would all be under the power of a common head, were he still living. This is the real family of the civil law.

3rd. The word *familia* also included the slaves, and those who were in *mancipio* of the chief, though they were only in the family as chattels, without any tie of relationship.

4th and lastly. *Familia* sometimes meant all the goods, all the patrimony of the chief.¹



SECTION XX.—SUCCESSIVE MODIFICATIONS OF THE LAW RELATING TO THE FAMILY.

69. The course of the gradation of the Roman civil family towards the natural family, or the family of consanguinity, is worthy of remark.

Gentilitas fell gradually into disuse and ended in becoming a mystery. Then the *nexum* and the *addictio* of the free man disappeared. The *manus* and the *mancipium* followed—at least so far that they remained only as legal fictions to evade the severity of the ancient law. Under Justinian we find no longer any mention of it, and until the discovery of the Institutes of Gaius we had only an erroneous notion concerning it. The *patria potestas* underwent all kinds of restrictions, both in relation to property and persons. The son was accorded first of all certain rights and then property as his own; he became a *persona*. Meantime the prætorian system leaned towards blood relationship, and tended more and more to impart family rights to cognates. *Senatus-consulta*, imperial constitutions, the legislation of Justinian, all tended to the same result, till by the *Novellæ* of this emperor the traces of the Roman family and its ancient effects were nearly obliterated. Thus

¹ Such was the sense of this word in the law of succession of the Twelve Tables: *adgnatus proximus familiam*

habeto—gentilis familiam nancitor. See Ulpian, on these different acceptations, Dig. 50, 16, 195 et seq.

the political *familia* first disappeared, afterwards the religious *familia*, then the *familia* of the *jus civile privatum*, and there only remained the natural family.



§ IV. ON THE LOSS OR CHANGE OF STATUS.

(*Capitis Deminutio*).¹

SECTION XXI.—MAXIMA, MEDIA, MINIMA (*Capitis Deminutio*).

70. The three elements which comprised the status of the citizen under the Roman civil law (*status, caput*) might be lost in various ways. The loss of liberty involved that of the two other elements. The loss of citizenship (*civitas*) entailed that of the *familia*, but did not affect the personal liberty. Finally, the loss of *familia* neither affected liberty nor citizenship.

71. In the first two cases the civil status was entirely lost (*status amittitur*). In the third, the status was maintained (*salvo statu*), but it was modified, since a person came out of one family to enter into another, or to commence another (*status mutatur*). It must not be forgotten, that whoever underwent this modification of status, in any shape, always changed *family, property* and *person*. Family, since he passed from one to another; property, since in each family a distinct co-ownership was centred; finally person, since there was in each family in law no other *persona* but that of the chief, and by changing his status he quitted this *persona* to identify himself with another, or to invest himself with a new one.

All these events were called *capitis deminutio*, of which there were three degrees,—*maxima, media, minima*.

¹ The literal translation of these words, *capitis deminutio*, by the French expression *diminution de tête*, is certainly not French, as M. Pellat has judiciously remarked in his treatise *On property and usufruct*, p. 96. It is, however, retained as a technical expression, having a special signification.

The same remark applies to many other expressions, such as *usucapion, usucaper, vindication, condition*, etc., etc. It would disfigure the language of Roman law to turn it everywhere into French: the language of science in many instances is technical, and it is thus it should be taken.

72. The word *deminutio*, which expresses a fall or degradation in the status of the person, is clear and intelligible when applied to the *maxima deminutio capitis*, and to the *media deminutio capitis*; but in connection with the *minima deminutio capitis*, its use has given rise to the theory that in this case it is not a question of loss of family, but of the degradation experienced by the person who suffered it, when as the result of adrogation he passed from the condition of head of a family to that of a son; or when in order to be emancipated, that he might be given by his father to another in adoption, he passed by a fiction, according to primitive forms, into the inferior condition of a man *in mancipio*. That there is truth in this last observation, and that the fact it exposes may have produced a certain influence, historically considered, in the adoption of the expression *capitis deminutio*, we will not deny; but it is not merely in the explanation of the term, but in the practical consequences of the *minima capitis deminutio*, that the two systems disagree. Notwithstanding the high authority¹ who has subscribed to this view, we utterly repudiate it as ignoring the characteristic feature of the old Roman family, and as overlooking the all important part that this institution took, whether in the *jus sacrum*, the *jus publicum* or the *jus privatum*, and so placing in the background that which should be made prominent in an exposition of Roman law and the condition of persons.



CHAPTER III.

OTHER CONDITIONS AFFECTING PERSONS BESIDES STATUS (*Status*).



SECTION XXII.—GENERALLY.

73. Besides the status of man, considered in its three essential elements, we find that other distinctions were recognized which, without altering the *status*, nevertheless modified the law re-

¹ Savigny, *Treatise on Roman Law*, vol. ii. app. 6.

garding it. These distinctions may be considered in connection with a man's political and his physical relations.

And, first, as to his political relations.



SECTION XXIII.—EXISTIMATIO.

74. *Existimatio* is thus defined by Callistratus: *dignitatis illasæ status, legibus ac moribus comprobatus*.¹

It was the honour of the Roman citizen, founded both on the laws and on custom, and which must remain intact to entitle to full enjoyment of civil rights, both as regards the *jus publicum* and the *jus privatum*.

This *existimatio* could be totally lost (*aut consumitur*), which happened whenever the status of a free man was destroyed, or only diminished (*aut minuitur*).²

75. The modifications the *existimatio* could undergo were three:—

1st. Infamy (*infamia*), which proceeded from two sources: either it attached to the person by reason of the practice of certain professions, or certain shameful acts specially denounced by the law or by the edict of the prætor, and by the mere practice of these professions or the commission of these acts; or else it was the consequence of a condemnation incurred either for public misdemeanor or in certain private suits. Such persons were called infamous (*famosi: qui notantur infamia*), or simply *notati* (a term derived from the note or mark of the censor), and suffered many disabilities. The Digest of Justinian has a special article, entitled *De his qui notantur infamia*, where the text of the edict of the prætor, enumerating the cases of *infamia*, has been preserved.³ It is curious as a study of Roman society. In this class were ranked, in all probability, those whose goods had been sold in bulk by creditors by reason of insolvency. This affixed the stigma of ignominy, which was followed by

¹ Dig. 50, 13, 5, § 1, f. Callistrat.

² Dig. 50, 18, 5, §§ 2 and 3.

³ Dig. 3, 2, *De his qui notantur infamia*.

loss of reputation and legal disabilities,¹ as it is with us in the case of bankruptcy. Hence we see why the Roman citizen dying insolvent was so desirous of instituting one of his slaves an involuntary heir, in order that, even after his death, the sale should take effect not on his memory but upon the slave.

2nd. Turpitude (*turpitude*), which took effect in cases where, though neither the law nor the prætor proclaimed the man infamous, public opinion, more sensitive than written law, affixed to the *existimatio* a stigma on account of the turpitude of the life (*vite turpitude*) or of the profession.² The legal disabilities resulting from this are nearly the same as in the former cases.

3rd. The *levis nota*, with which were branded the enfranchised and the children of those who got their living on the stage (*qui artem ludicram faciunt*), which rendered them incapable of marriage with senators or children of senators. This prohibition was suppressed by Justinian.

The *levis nota* also, in the case of any one having been appointed heir, rendered the appointment open to attack by the brother or sister who had been prejudiced by it.³

A fragment of a constitution of Constantine clearly defines these three degrees of modification of the *existimatio*.⁴ However, the expressions *personæ turpes*, *viles personæ*, were very often indiscriminately applied.

76. *Infamia*, *turpitude*, and the *levis nota*, could be effaced, in certain cases, either by the senate, by the prince, by the magistrate, or sometimes by time, according to circumstances.⁵

¹ Gains, 2, § 154.

² Cod. 12, 1, 2, const. Constant. Dig. 22, 5, 3, pr. f. Callistr.; 37, 15, 2, f. Julian.; 50, 2, 12, f. Callistr. Inst. 2, 18, *De inoff. testam.*, § 1.

³ Ulp., *Reg.*, tit. 13, and tit. 16, § 2. Dig. 23, 2, 44, pr. and § 5, f. Paul; 40, 11, 5 f. Modestin. Cod. 3, 28, 27, const. Constant.

⁴ "Si scripti heredes *infamiae*, vel *turpitudinis*, vel *levis nota* macula adspersantur." Cod. 3, 28, 27, const. Constant.

⁵ Dig. 3, 1, 1, §§ 9 and 10, f. Ulp. See, however, Cod. 9, 43, 3, const. Valent., Valens and Gratian; Cod. 9, 51, 7, const. Philipp.

SECTION XXIV.—RANK—DIGNITY.

77. The history and the legislation of Rome, where society was essentially aristocratic, at least in its origin and in its earlier phases, everywhere exhibit the consequences of the distinction which existed between different castes and ranks, as well as the characteristic distinctions which accompanied official position; and we find these effects, not only in political, but even in private relations, a system which differs in many respects from our own. It will be as well to trace the historical developments of this peculiarity.

SECTION XXV.—THE PROFESSION.

78. The profession also, in many cases, had its influence even on the *jus privatum*. Certain professions enjoyed certain privileges: such, for instance, as those which the Romans called liberal professions (*liberalia studia*), for it is from the Romans that we derive this expression.¹

Others, on the contrary, involved loss or injury to the *existimatio*, and consequent disabilities: such were the callings which were attended with *infamia* or *turpitudō*. Among those who were the most favoured in consideration of their profession were the military (*milites*), in opposition to those who were not so (*pagani*).

SECTION XXVI.—RELIGION.

79. Differences in civil rights, as the effect of religious belief, began with Christianity. While it was proscribed and persecuted, the disabilities were directed against the Christians; when it became the religion of the empire, they were directed against their opponents. Then came distinctions even in the application of the *jus privatum*: the faithful or orthodox Christians, or catholics (*orthodori*, *catholici*), were so called if they acknowledged the dogmas of the œcumenical councils;

¹ Dig. 50, 13, *De extr. cogn.*, 1, pr. f. Ulp.

and on the other side were the heretics (*hæretici*), amongst whom were ranked in distinct orders the apostates (*apostatæ*) and the Jews (*Judæi*). To each of these classes there were corresponding legal distinctions attached: the orthodox Christians alone enjoyed the full privileges of their favoured position; the worst condition was that of the Jews, who only had *commercium* with Christians, and were excluded from the *connubium*; they were unable to bear witness against them or to fill any magistracy.

The Codes of Theodosius and of Justinian contain several articles on these religious classifications and their results.¹ It is too much the practice in our schools of jurisprudence to overlook these points of Roman law, which are most important to the efficient study of the history of these times.

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SECTION XXVII.—THE DOMICILE (*Domicilium*: where one is *Incola*); THE LOCAL CITY (where one is *Civis*, *Municeps*).

80. The domicile (*domicilium*) is simply, in a legal sense, the residence of every person²—the locality where he is supposed

¹ Code of Theodosius, all the 16th book, articles 1 to 11; especially 1, *De fide catholica*; 5, *De hæreticis*; 7, *De apostatis*; 8, *De judæis cælicolis et Samaritanis*; 10, *De paganis sacrificiis et templis*. Code of Justinian, lib. i., the two first books, especially 1, *De summa Trinitate et fide catholica*; 5, *De hæreticis et manichæis et Samaritanis*; 7, *De apostatis*; 9, *De judæis et cælicolis*; 10, *Ne christianum mancipium hæreticus, vel judæus, vel paganus habeat*, etc.; 11, *De paganis sacrificiis et templis*.

² I certainly do not admit the definition, that the domicile is *the place* where a person has his principal establishment; the domicile is not *the place*, it is *at the place*, as our civil code plainly says—art. 102. But I do not admit any more the definition, pretty generally substituted, of domicile as the legal relation which exists between a person and the place where that person exercises his rights. In order to test this definition, suppose we

say, “to leave a summons at the domicile,” *i. e.*, “to leave a summons at the legal relation of etc., to appear before the tribunal or the municipality of his domicile;” or suppose, instead of saying, “having left his domicile,” we substitute, “having left the legal relation, etc.”

The truth is, that this definition, being too absolute, defines nothing. All right consists in a relation, either from person to person, or—if we like to say so—from person to thing. Possession, property, are certain relations between a person and a thing; the place of residence, the domicile, are also special relations between a person and a place; relation of fact in the one case, of right in the other. It is therefore not defining these facts, or these rights, to say they are relations. What is there peculiar in the one which constitutes the domicile?

In the same manner that law, as we shall see, creates persons and things which do not materially exist, so it

to be, in the eye of the law, for certain applications of the law, whether he is corporeally to be found there or not. It is to Roman legislation that we are indebted for the following description of the conditions which constitute the domicile:—
*"Ubi quis larem rerumque et fortunarum suarum summam constituit; unde non discessurus, si nihil avocet; unde cum profectus est peregrinari videtur; quod si rediit, peregrinari jam destitit."*¹ The domicile gives to persons, not the qualification of *civis*, but that of *incola*, in the town where they are established.² It is closely connected with the obligation to undertake public duties, magistracies, &c.³

§1. In Roman law the question of domicile was immediately connected with that of local citizenship. The question to be determined was the *civis, municeps*, whether resulting from

creates facts which it considers as existing, whether they do or not. Domicile is one of these facts. Law, from certain premises, supposes, for the exercise or for the application of certain rights, that a person is in a certain place. Whether he is or not, matters little, for the exercise or for the application of the law in question; he is always supposed to be there, and proceedings may take place in accordance with that supposition. This legal supposition may be applied to the same person in different places, according to whether this or that law is in question; for example, civil or political rights in general, or a certain particular civil right, such as those which refer to the celebration of marriage, to the execution of a certain contract, to the prosecution of an obligation, of a certain real right, or to the defence against such prosecutions; or when it is a question of certain special political rights, like that of parliamentary election or eligibility, or of municipal election or eligibility. So that the same person is always supposed to be in one place for the exercise of a certain right, and in a certain other place for the exercising of some other right. As to the premises on which the law founds this supposition, they are liable to vary,

not only in different systems of legislation, but also in the same legislation, according to the different rights to which it is applied. These premises may be, for instance, either the origin of birth, or the principal establishment, or a certain length of residence, or the convention of the parties, or the payment of taxes, or even simple declarations made beforehand.

To sum up, it is seen that domicile is in law, what residence is in fact. The domicile in its simple and essential meaning is "the *legal seat*, the *judicial seat* of a person for the exercise or for the application of certain rights;" or it may be expressed thus, "the seat, the dwelling which a person is always supposed to have in the eye of the law for the exercise and application of certain rights." The derivation of the word *domicilium* is sufficient to show the force of this explanation, as exact as it is simple.

¹ Cod. 10, 39, *De incol.*, 7, const. Dioclet. et Maxim.

² "*Cives quidem origo, manumissio, allectio vel adoptio; incolae vero (sicut et divus Hadrianus edicto suo manifestissime declaravit) domicilium facit.*" Ibid.

³ Dig. 50, 1, 29, f. Gai.; Cod. 10, 39, 5 and 6, const. Dioclet. et Maxim.

origin, adoption, manumission or otherwise. This second question was of the greatest importance, and was treated in much detail at the time when all the towns of the empire had not all the same legal condition, and where rights of citizenship and privileges were enjoyed in different degrees in different towns; for there was then more advantage in being a member of one city than of another.

But after the constitution of Caracalla, which made all the subjects of the Roman empire citizens, no matter where the domicile, Rome was the common country. "*Roma communis nostra patria est*," as Modestinus said.¹

82. But why should the question be asked, whether a man belonged, as citizen, to one town or another? It was, in the first place, on account of the public offices, and the municipal duties to which a man was always liable to be called in his own city, independently of those duties required of him at the place of his domicile—municipal duties which recall to mind the miserable condition into which the curiales and the decurions, the principal inhabitants of the city, had fallen during the last period of the empire. It was, in the second place, because the constitution of Caracalla, granting equality of rights to all the inhabitants, did not grant it to all territories. We have seen that it was only under Justinian that the difference as to the soil was obliterated. In fact, it was necessary to ascertain the domicile in order to determine who was liable to the burdens and obligations of each separate municipality, to undertake the functions of magistrates; and, in many cases, it was the domicile and not the residence of the defendant which determined the place of litigation.

83. There are, therefore, these three points to be distinguished: 1st, Rome, the common country; 2nd, the local city, where a man was *civis, municeps*; and 3rd, the place where he had fixed his domicile, the legal habitation, where he was *incola*.

¹ Dig. 50, 1, *Ad munic.*, 33, f. Modest.

The Digest and the Code of Justinian each contain a special article on these points.¹

It is important to distinguish between domicile and residence—there might be domicile without residence, or residence without domicile. Residence is preserved by the act, domicile by the intention.²

Secondly, as regards physical conditions.



SECTION XXVIII.—THE SEX.

84. The distinction of sex was attended with many important consequences in Roman law: as to the *jus publicum*, from the rights of which women in ancient as in modern times were entirely excluded; as to the *jus privatum*, within the scope of which their condition became ameliorated by the development of social civilization. Women, in the primitive law of the Romans, were under the power of their father, or under the hand of their husband; they were the property of another, and when circumstances had made them *sui juris*, *matres familias*, they were placed under a perpetual guardianship, the supervision of their agnates, never having any power over their children. The woman was, in short, as is elegantly and concisely expressed by Ulpian, "The beginning and the end of her family." *Mulier autem familie suæ et caput et finis est.*³

The subterfuges and the fictions which the law placed at the disposal of the Roman ladies to shield them from the severity of civil law must be studied. The perpetual guardianship to which they were subjected began to give way under the republic: "Our ancestors," says Cicero, "wished all women to be in the power of the tutors; the jurists invented a kind of tutors who were in the power of the women,"⁴ this tutelage finally fell into disuse.

¹ Dig. 50, 1, *Ad municipalem et de incolis*. Cod. 10, 39, *De incolis, et ubi quis domicilium habere videtur, et de his qui studiorum causa in aliena civitate degunt*.

² See Dig. 4, 6, *Ex quibus causis majores in integrum restituantur*; 50, 16, 173, f. Ulp.: "Qui extra con-

tinencia urbis est, abest." Ibid. 199, f. Ulp.: "*Absentem accipere debemus eum, qui non est eo loco, in quo loco petitur*;" 50, 17, 124, f. Paul. Cod. 7, 33, 12, const. Justin.

³ Dig. 50, 16, *De verb. signif.*, 195, § 5, f. Ulp.

⁴ Cicero, *Pro Murena*, 12, 27.

Under the legislation of Justinian the character of the ancient system was lost; but there nevertheless existed several legal distinctions between men and women: the age of puberty for women was earlier than for men, and the law was in some cases more and in others less favourable to them.

85. The jurists discuss, under this head, the hermaphrodites (*hermaphroditus*), that is to say, those whose sex was doubtful, but who were formerly considered as uniting in themselves both sexes. They decided that such persons were to be regarded as belonging to the sex which predominated in them.¹



SECTION XXIX.—AGE.

86. Roman law, following the analogy of nature, arranged age, capacity and protection on a graduated scale. But in the early stage of its history, when the rudeness of primitive society and materialism were predominant, it confined its distinctions to two phenomena of physical nature, the faculty of speech and the power of generation. The former, because the acts of the Quiritarian law were accomplished by means of established formulas and symbolic terms which the parties had themselves to pronounce, and therefore anyone who was unable to speak was materially incapable of such acts, and no one could perform them for him. The latter, because it is the essential and sole physical condition of marriage. The tendency of jurisprudence, of the prætorian system, and, finally, of imperial law, was to substitute for, or at least place on equal footing with, these entirely material considerations, a distinction more intellectual, derived not from corporeal but from moral development. The different periods were thus categorized.

87. First, *infancy*, an indeterminate period, but very short, the limit of which was defined by a material fact—speech. This period hardly comprehended more than the first two years,

¹ Dig. 1, 5, 10, l. Ulp.; 22, 5, 15, § 1, f. Paul.

during which a child was *infans*, *qui fari non potest*,¹ because the *infans* could not utter the sacramental words, the established formulas required by civil law; and no other citizen could utter them in his stead. At a later period of legal history a more intellectual distinction was adopted, the child being considered by law as having no intelligence (*nullum intellectum*).

88. The second period was *the age above* that of childhood; from the moment when the faculty of speech accrued up to the age of puberty. In this period there is power to give expression to the judicial formulas. Still there did not exist the *persona* necessary for the accomplishment of the acts of civil law, viz. adult status, that is, citizenship and puberty. To supplement himself, he being *sui juris*, but not having puberty, it was necessary that another having both qualities, his tutor, should be added to him; this addition completed his *persona* (*auctoritatem præstare*; *auctor fieri*: words which have received different significations and various applications, but whose common root is *augere*, to augment). The infant then could utter the necessary words and the tutor be the *auctor*, and so between them they were able to accomplish the act required by civil law.

The later and more philosophical system substituted for this material distinction was founded more on the principle of moral development and divided the period into two parts; 1st, the age nearer *infancy than puberty*, when the man was *infanti proximus*; and, 2nd, in an inverse sense, the age when he was *nearer puberty than infancy*, or *pubertati proximus*. The exact age or turning-point was thus left undetermined, but the tendency of jurists was to fix it at seven years. This system proceeding on the basis of intellectual analysis assimilated the *infanti proximus* to the *infans*; while it regarded the *pubertati proximus*, or the child who had reached the age of about seven years, as having by that time acquired a certain degree of intelligence (*aliquem intellectum habet*), but not judgment

¹ Dig. 26, 7, *De adm. tut.*, 1, § 2, f. Ulp.

(*animi iudicium*). On account of this deficiency the law attached certain incapacities to this age, less important however than that of uttering the necessary formulas.

Under the Lower Empire, a constitution of Theodosius respecting the acceptance of maternal inheritances appears to assimilate the minor of seven years to the *infans*, without reference to the time at which he acquires the power of speech (*sive maturius, sive tardius, filius fandi sumat auspicia*).¹ And it was in consequence of this constitution that the interpreter of Roman law applied the term *infans*, not to one who does not yet speak, but to the minor of seven years of age.

89. Thirdly, puberty: the period the beginning of which is equally indefinite as regards the physical development of the individual, and yet depends upon a physical fact, the generating faculty. The jurists, from motives of decency, decided to fix the first period for women at a precise age, that of twelve years. Their tendency was also to fix it for men at fourteen years, the term which Justinian adopts and establishes by a legislative act. Man is called *impubes* before this period, and *pubes* as soon as he has reached it. Puberty carried with it both the capacity of forming *justæ nuptiæ* and, in the case of males, the termination of the guardianship, because the citizen of the age of puberty possessed the *persona* requisite to empower him to perform the acts demanded by civil law; he enjoyed, according to the theory of jurisprudence, intelligence and judgment.

90. Fourthly, majority—fixed at the age of twenty-five years; this limit was laid down by a law of the sixth century of Rome, the *lex PLÆTORIA*, but it derived its authority especially from the prætorian law, as resting on the basis of full moral development. Under that age, the prætor granted to the youth of the age of puberty a special protection, with prætorian remedies, in order to protect him against the prejudicial consequences of the capacity attributed to him by the civil law at puberty; but when the age of five and twenty years had been

¹ Cod. Theodos. 8, 18, *De maternis bonis . . . et cretione sublata*, 8, const. Arcad., Honor. et Theodos.

attained, the man was regarded in the eye of prætorian law as having acquired full maturity of judgment, and could no longer be protected against the consequences of his own acts by the intervention of the prætor, at least under ordinary circumstances.

91. Finally, old age (*senectus*), to which Roman law had fixed no general or precise term, but which, as far as regards exemption from public duties, began at the age of seventy,¹ on the principle recognized by the jurists, "*semper in civitate nostrâ senectus venerabilis fuit.*"²

92. The expressions major and minor had not in Roman law the same signification as with us; they were frequently used as comparative merely, and in such case required the complement—minor by so many years, major by so many years. However, sometimes, though rarely when standing alone, they expressed the fact of the person being more or less than twenty-five years of age.



SECTION XXX.—PHYSICAL OR MENTAL DEFECTS.

93. There were many cases in which the law was affected by physical defects, which might give rise to legal incapacity and exemptions; as, for instance, in the case of the *spadones* and *castrati*, of the deaf (*surdi*), the mute (*muti*), or deaf and dumb (*surdi et muti*), as well as of those who were afflicted with some perpetual disease (*qui perpetuo morbo laborant*).

94. And so also in the case of mental afflictions. The Roman law seems to have made distinctions, though not very clearly marked, between persons thus affected: thus, the dangerous (*furiosi*) were those who had lost their intellectual faculties; the demented (*mente capti*), those in whom they were wanting; also the imbecile (*dementes*), and the prodigal (*prodigus*). The

¹ Dig. 27, 1, 2, pr. f. Modest.; 50, 6, 3, f. Ulp. Cod. 5, 68, 1, const. Sever. et Anton.; 10, 31, 10, const. Dioclet. et

Maxim.

² Dig. 50, 6, *De jure imm.*, 5, pr. f. Callistr.

system of curatorship was connected with these cases of mental defect.

CHAPTER IV.

OF THE CAPACITY OF PERSONS.

SECTION XXXI.

95. From what has gone before we may see how the legal capacity of persons to enjoy and exercise rights depended on a great number of conditions, and how it varied in its degrees. This idea of the legal capacity of individuals has been taken by M. Blondeau as a basis for a particular classification of persons, and also by M. Savigny for an exposition of the law concerning persons; but such a basis was too abstract an idea for the Romans.

SECTION XXXII.—TUTELA—CURA.

96. In cases where the law recognized or established an incapacity for the exercise of rights, it was necessary that it should provide some legal protection. This was clear, on the ground of humanity; but the Roman civil law was not grounded on the basis of humanity. Property and ownership were centred in the family, and it was necessary to guard against the loss of it. It was to the members of it that the duty was entrusted, as much for the defence of their rights as for the protection of the incapable ones. At a later period, however, when law passed into the condition of a philosophical system, the idea of a protective power became predominant.

Thus the theories of *tutela* and *cura* were closely connected with the question of sex and age, and the absence or failure, or mutation of intellectual faculties, only of course as regards persons *sui juris*; for those who were *alieni juris*, being in the power of another and regarded as property belonging to the head of the family, required no other protector.

97. The *tutela* and the *cura* had distinct characteristics.

The *tutela* was made use of in cases of incapacity to complete the *persona* required by civil law for the accomplishment of legal acts. Such incapacity arose from the party not having arrived at the age of puberty, and in early times attached to all females. The *cura*, on the contrary, was made use of in cases of accidental incapacity which might affect one person and not another, and which might affect a person in a particular instance, who was, although in other respects fully qualified under the civil law to transact other acts, in want of some one to look after his interests.

There was thus a radical distinction between the functions of the tutor charged with completing the incomplete *persona* (*auctor fieri*), and those of the curator charged with looking after business matters (*curare*). Thence also this rule: The tutor was given to the person, the curator to the goods.

98. The functions of the tutor differed according to the age of the ward, varying according as the latter was too young to exercise the faculty of speech, or was of an age when it was possible for him to utter the solemn words of the judicial formulas.



CHAPTER V.

LEGAL PERSONÆ.



SECTION XXXIII.—POPULUS—CURIÆ—MAGISTRATUI—HÆREDITAS—PECULIUM—UNIVERSITAS.

99. The people (*populus*), the republic (*respublica*), the emperor, not in an individual but in a public character,¹ were abstract persons which only existed by the creation of the law, but which might, as much as an individual, be the active or passive subject of the law. So also were the magistrates,² the *municipia*, the *curiæ* of the different towns, the *ærarium* or

¹ Dig. 4, 2, 9, § 1, f. Ulp.

² Dig. 38, 1, 20, § 1, f. Scævola.

exchequer of the people, to which was afterwards added that of the prince, the *fiscus*, which ended by absorbing the *ærarium*; the *hæreditas jacens*, that is, the vacant inheritance before it had been entered on by the heir, and which, among the Romans up to the time when it was realized, sustained the *persona* of the deceased (*personam defuncti sustinet*);¹ the *peculium*, which, according to the expression of Papirius Fronto, resembled a man;² the temples and the different colleges of pagan pontiffs; the churches and various orders of the Christian clergy which supplanted them; the convents, the hospitals, and the religious endowments;³ in a word, all the communities, universities, colleges, corporations (*universitas, corpus, collegium*), formed so many abstract *personæ*, whose existence was purely legal, but who, like physical persons, might be the active or passive subjects of rights.

100. The foundation of universities, colleges and corporations in Roman law was strictly confined to the *jus publicum*; no such body could be formed or dissolved at the mere will of the parties constituting it. No corporation could of its own free will establish itself and acquire a *persona* in the state. Every corporation had to be specially authorized by a *lex*, by a *senatûs-consultum*, or by an imperial constitution. They required besides the conjoint action of three persons at least for their institution,⁴ but not for their continuation.⁵ The members were called *sodales*.

101. The legal status of the *fiscus* was a subject to which the jurists devoted much attention.⁶

¹ Dig. 41, 1, 34, f. Ulp.

² "Peculium nascitur, crescit, decrescit, moritur; et ideo, eleganter et Papirius Fronto dicebat, *peculium simile esse homini*." Dig. 15, 1, 40, pr. f. Marcian.

³ Cod. 1, 2, *De sacrosanctis ecclesiis*, 22, const. Justinian; 1, 3, *De episcop. et cleric.*, 28, const. Leon.

⁴ Dig. 3, 4, *Quod cujuscunque uni-*

versitatis nomine vel contra eam agatur, 1, pr. f. Gal.; 47, 22, *De collegiis et corporibus*.

⁵ Dig. 50, 16, 85, f. Marcell.; 3, 4, *Quod cuj. univ.*, 7, § 2, f. Ulp.

⁶ Paul., *Rec. Sent.*, lib. v. tit. 12; Fragmentum vet. juriscons., *De jure fisci*; Cod. Theod. 10, 1; Dig. 49, 14; Cod. Just. 10, 1.

CHAPTER VI.

THE EXTINCTION OF PERSONÆ.

SECTION XXXIV.

102. The *persona* of an individual became extinct either by death or by a *deminutio capitis* involving the loss of liberty; for in Roman law no slave had a *persona*, at least in early Roman law and in respect of the proprietary right enjoyed by the master as to his slave. It was always important to fix the precise moment when this event took place. The law had to determine on this point on whom should fall the duty of proof, and, in cases of doubt, what were the presumptions to be adopted.¹

103. But here we must draw attention to a very remarkable legal phenomenon. Although the individual might die, the *persona* which was in him did not necessarily become extinct. As a creation of civil law it could not become extinct by a material death. As the soul which leaves the body goes, as some philosophers say, to animate other beings, so (but more certainly in the case of Roman legislation) did the legal *persona* free itself with the last breath of the dying to go and perpetuate its existence in other individuals.

104. The destiny of *personæ* of pure legal conception, created by law, was somewhat similar. The existence of universities and of corporations is always in the power of the law, which can pronounce their dissolution. They also end with the aim for which they have been formed, or with the extinction of the members of which they were composed.

¹ See especially, on this last subject, Dig. 34, 5, 9, f. Tryphon.

ARTICLE SECOND.



II. OF THINGS.

CHAPTER I.

OF FUNDAMENTAL PRINCIPLES.



SECTION XXXV.—GENERAL IDEA OF THINGS.

105. The word “thing” (*res*) even in law is a flexible word, which lends itself, with marvellous facility, to the wants and whims of language. The question for us is its real legal sense.

In the same manner as the word *persona* designates in law every being considered as capable of becoming the active or passive subject of right, so the word *res* designates everything which is considered susceptible of forming the object of rights; and in this category is included everything which man, the universal dominator, has been able to regard as subject, or at least destined, to minister to his wants and his pleasures; for, in reality, the end which a man proposes to effect by the exercise of rights is the satisfaction of his wants and the enjoyment of reasonable pleasures, either in his moral or physical perceptions.¹

106. We say everything,—for physical and material objects are not alone comprised in it. In fact, just as there are persons of purely legal creation, so are there things which do not exist in nature, and which law alone has created. Law, by its power of abstraction, creates things as well as persons.

Finally, if law sometimes raises purely material objects to the rank of persons, it sometimes inversely lowers man to the rank of things; such, for instance, are slaves, when they are con-

¹ This does not mean to imply that we ought to adopt as a maxim the false proposition, that the aim of our life is happiness. Happiness is not an aim, it is a consequence. A man's aim is to fulfil the mission which has been

given him here below, in the economy of creation, where every thing and every being has been accorded its own aim. We are part of a great whole, and our destiny is involved in the destiny of the whole.

sidered as subjected or as devoted to the purpose of satisfying the wants of other men, incapable of being, in the relation of slave to master, the subject, but the object, of rights.

If what we have just said about things is compared with what we have already said about persons, it will be seen at once that the two cases are parallel.

107. Roman jurists indeed have not laid down the definition of things in the same wide and philosophical terms that we have adopted, which include *everything which can be the object of a right*, not only corporeal things, but also acts, the status of persons in different conditions, and in general all rights. Their ideas were at first directed to regarding things (*res*) as corporeal objects, which, being of some use or other to man, could form in relation to him the object of a right; but they afterwards extended the use of the word so as to make it include abstract ideas—objects of purely legal conception.



CHAPTER II.

CLASSIFICATION OF THINGS.



SECTION XXXVI.—RELATIONS UNDER WHICH MAY BE RANGED THE PRINCIPAL DIVISIONS OF THINGS.

108. Things were classified in various ways. A special chapter is devoted to this subject, both in the Digest and in the Institutes.¹ These various divisions do not, however, embrace all things. Without altering the Roman system, we will endeavour to complete it.

The notion upon which each classification is based must be clearly realized in order to avoid confusion.

Origin—religion—*civitas*—*proprietas*—physical or legal nature—composition and combination must all be considered.

¹ Gai., *Inst.*, 1, §§ 1 to 17; Dig. 1, 8, *De divisione rerum et qualitate*; Inst. 2, 1, *De rerum divisione*.



§ I. IN RELATION TO THEIR CREATION.

SECTION XXXVII.—THINGS CORPOREAL AND INCORPOREAL.

109. Things are either of natural creation or of legal creation. The division made by Roman law on this basis is that of *res corporales* or *res incorporales*.

The first are those which really exist; they are physical objects which influence our physical senses, at least so far as the power of our organs, aided by art, can reach (*quæ tangi possunt*).¹

Amongst corporeal things ranks the man-slave, considered in the relation of the power of the master over him, though he is only a chattel by the creation of the law.

The second are only abstractions, which do not affect our senses (*quæ tangi non possunt*), and are only conceived by the mind. Such are those which consist in a right (*quæ in jure consistunt*). Such are the rights of inheritance, of servitude, of usufruct, of obligation.² They are ranked as things, inasmuch as they are capable of being acquired and disposed of by persons, and are recognized as legal objects, attached to which are rights. If, however, we were to comprehend in this general theory every incorporeal entity, all rights would be included, for all rights are incorporeal; but this would be to confound incorporeal things with rights.

110. The distinction of corporeal and incorporeal things is not that with which Roman jurists commenced their classification, but, according to all rules of logic, the creation of things ought to come first.

§ II. IN RELATION TO RELIGION.

SECTION XXXVIII.—RES DIVINI JURIS AND RES HUMANI JURIS.

111. First, religion.

To feel the importance of what Gaius calls the *summa*

¹ Gai. 2, 12 to 14; Dig. 1, 8, *De div. rer.*, 1, § 1, f. Gai. ² Ibid.

rerum divisio, into things of divine and of human right, we must realize the close union that existed between religion and the civil law among the Romans, as well as the sacerdotal character of their primitive law in its public as well as in its private institutions.

112. Among *res divini juris* are ranked :—

1. The sacred things (*res sacræ*), that is to say, things consecrated with religious rites, and under legal authority, to the superior gods.

2. The religious things (*res religiosæ*), abandoned to the inferior gods, to the *manes* ; such as the tombs or the earth in which a dead body is buried.

3. Holy things (*res sanctæ*), which were only of divine right by assimilation (*quodammodo divini juris sunt*), the essential characteristic of which was, that they were protected against insult by a public and penal sanction :¹ such were the walls or the gates of the city.

The sepulchre of the enemy was not *religiosum*,² that of the slave was.³

A *res divini juris*, which had fallen into the hand of the enemy, was desecrated ; its sacred character departed, and could only be restored by reconquest.⁴

We must mention, in this place, the *sacra familiæ*, *sacra gentis*, things sacred to each family and *gens*, with the obligation to perform sacrifices, and private or domestic worship, which formed the religious bond uniting the family, and which were transmitted from generation to generation. On this subject we have little written evidence.

Finally, we must trace the changes which resulted from the decline of Paganism, its fall, and the establishment of Christianity in its place.

¹ From the verb *sancire*, *sanctum*, to sanction, to guarantee.

² Dig. 47, 12, *De sep. viol.*, 4, f. Paul.

³ Dig. 11, *De relig.*, 7, 2, pr. f. Ulp.

⁴ Dig. 11, 7, 36, f. Pompon.

§ III. IN RELATION TO THE STATE.

SECTION XXXIX.—RIGHTS OF CITIZENSHIP—THE IDEA OF THE COMMERCIIUM APPLICABLE TO THINGS AS WELL AS TO PERSONS.

113. The exclusive privilege of Roman citizenship which was so jealously guarded was not limited to persons: it was shared by things. As there were persons who were foreigners, so there were foreign things. There was a capacity for civil rights in things as in persons;¹ a capacity in the former case for being objects of the civil law, as in the latter for being its subject.

114. The element of the *jus civitatis*, which was communicated to things as well as to persons, in relation to the *jus privatum* and not the *jus publicum*, was the *commercium* in its most comprehensive sense, because to carry on commerce there must be both persons and things. As regards persons, there was a civil capacity to effect transactions, acquisitions, alienations under Roman civil law; as regards things, there was the civil capacity of being the object of these transactions.

SECTION XL.—ROMAN SOIL (*Ager Romanus*); ITALIAN SOIL, OR THAT WHICH ENJOYED ROMAN PRIVILEGES (*Italicum Solum*); AND PROVINCIAL OR FOREIGN SOIL (*Solum Provinciale*).

115. The distinction between the different kinds of soil and the peculiar privileges attached to each, though apparent throughout the whole of Roman history and legislation, is commonly greatly neglected by the modern student of Roman institutions. This distinction must, however, be realized, and a sharp line drawn between soil to which all civil rights were attached in which the Roman *proprietas* could exist, and which must be dealt with according to all the formalities of the ancient law, and that soil which was beyond the influence of Quiritarian

¹ "Sintne ista prædia censui censenda (says Cicero, *Pro Flacco*, § 32), habeant jus civile, sint necne sint mancipi?"

dominium, if we would avoid obscurity concerning many institutions of which we constantly encounter the vestiges.

116. The same train of ideas as to the *jus civitatis* must be applied equally to persons and to things, care being taken to distinguish between rights which were personal and those which were territorial.

In the first place there was the *ager Romanus*,¹ the field, the soil, the Roman territory, the only soil amenable to the operation of the *jus civile*, as the children of Rome alone were citizens of the empire. In spite of Roman conquests, and the constant extension of the empire, the *ager Romanus* remained the same as in the early days of Rome. And although the old distinction has long passed away, yet tradition, which survives the superposition of races, the progress of civilization, and the change of time, still points to what is called, in the language of the day, the *agro Romano*. Only just as the inhabitants of other towns were accorded, as an act of favour, the privileges of Roman citizenship, so the privileges of the *ager Romanus* were conceded to other lands.

Thus gradually, sometimes as the result of free gift, at others of the force of arms, the rights and privileges attaching to the *commercium* and the *ager Romanus* were conceded, either in whole or in part, to the colonies, to Latium, to the whole of Italy, and even to *municipia* erected beyond its limits.

117. The most comprehensive, and that which ultimately became the general term to describe soil enjoying civil rights, was *Italicum solum*,² assimilated, so far as regards the application of the *jus civile*, to the *ager Romanus*. Whence the *jus Italicum*, principally a territorial privilege, both in relation to the *jus publicum* and *jus privatum*. When they wanted to extend this privilege beyond the limits of Italy, and to grant a similar favour to territories or to towns beyond it, they assimilated their soil to the *solum Italicum*; they granted them in fact, more or less completely, the *jus Italicum*.

¹ Varro, *De lingua latina*, 5, 33 and 35.

² Ulp., *Reg.*, 19, § 1; *Inst.* 2, 6, pr.; 2, 8, pr.

118. The *solum provinciale* held an inferior place both in relation to the *jus publicum* and to the *jus privatum*, as it was soil in whose favour no exceptional concession had been made, and which was totally without the pale of Roman civil law.¹ Law, in its progress towards a more general and philosophical but less Quiritarian system, invented indirect methods of obviating the results of these distinctions, instead of endeavouring to efface them.

119. The constitution of Caracalla, which gave to all subjects of the empire the title of citizen, did not confer on all territories the enjoyment of the *jus civile*. While it elevated persons, it did not elevate the soil to the same civic privileges.

Justinian was the first to abolish all such distinctions between the soil of Italy and that of the provinces.²

120. This distinction of things is a distinction entirely territorial; it applies to immovables only and not to movables. The civil rights attached to movables follow them from place to place, and are not confined to locality.

SECTION XLI.—RES MANCIPI AND RES NEC MANCIPI.

121. The distinction of things into *mancipi* and *nec Mancipi* is an ancient distinction, which, in our opinion, already existed at the time of the Twelve Tables.³

¹ Gai. 2, §§ 7, 27, 31, 46, etc.

² Cod. 7, 25, *De nudo jure Quiritum tollendo*, const. Justinian; 7, 31, *De usucapione transformanda, et de sublata differentia rerum Mancipi et nec Mancipi*.

³ In addition to other grounds, this opinion appears supported by a fragment of Gaius, and it is inconceivable how it could have been neglected in this controversy: "*Mulieris, quæ in agnatorum tutela erat, RES MANCIPI usucapi non poterant, præterquam si ab ipsa, tutore (auctore), tradita es-*

sent: ID ITA LEGE XII TABULARUM CAUTUM." (Gai. 2, § 47.) We must remember that Gaius is, of all jurists, the one who deserves most credence when he treats of the law of the Twelve Tables and of its provisions, for he published a commentary upon it, of which some fragments have remained to us in the Digest. See also Gai. 1, § 192; 2, § 80; Ulp., *Reg.*, 11, § 27; Inst. de Just. 2, § 41; Vat. J. R. Frag. § 259; and §§ 293, 311, 318, for the existence of the things *mancipi* at the time of the *lex Cincia*, B.C. 204.

This distinction is unquestionably one of the civil law. Not indeed in the sense that everything enjoying the rights of Roman civil law was *res Mancipi*, and that this expression was synonymous with *jus civile*. Such a notion we wholly reject. But in the sense that a thing to be *res Mancipi* must necessarily have the *jus civile*, and consequently that all things not possessing the *jus civile* were necessarily *res nec Mancipi*.

But besides this, among the very things which came within the sphere of Roman civil law, some were *Mancipi*, the others *nec Mancipi*. The *res Mancipi* were consequently one branch of the *res* enjoying the *jus civile*. The *proprietas* among the Romans, as regards them, had a character not different, but somewhat more indelible: it was acquired and lost with more difficulty.

122. Thus, in the first place, the consent of the parties and tradition alone were powerless to transfer from one citizen to another the *dominium* of the things *Mancipi*. To accomplish this it was necessary to have recourse to a judicial and sacramental act, the mancipation (*Mancipium*, afterwards *Mancipatio*) with a symbol, established formulas, and the public assistance of a great number of citizens. Things *nec Mancipi*, on the contrary, were not susceptible of these judicial acts; simple tradition sufficed to transfer the *dominium* over them.¹

123. In the second place, the alienation of things *Mancipi* was not allowed in all cases where it was allowed in the case of things *nec Mancipi*. Thus the law itself of the XII Tables forbids a woman, placed under the guardianship of her agnates, to alienate anything *Mancipi* without the authority of her tutor; certain things could only go out of the family by the consent of the agnates, while the alienation of things *nec Mancipi* was allowed to the woman.²

This rule was so important that, even at the epoch when the guardianship of women was no longer anything but a fiction,—when the authority of the tutor only intervened as a matter of

¹ Ulp., *Reg.*, 19, §§ 3 and 7.

² Gai. 2, § 80; Ulp., *Reg.*, 11, § 27.

form,—when, if he refused it, the prætor was in the habit of forcing him to give it,—it was not even then possible to force certain tutors to authorize against their will the three most important and solemn acts of woman: her will or testament, her incurring obligations, and the alienation of things *mancipi*.¹ And if, in the face of these prohibitions, the thing *mancipi* had been alienated by the woman, the possessor was unable to acquire it by *usucapio*, unless the *tradition* had been made with the authority of the guardian; it is the law of the XII Tables itself which thus speaks, *id ita lege XII Tabularum cautum*, as Gaius says.²

124. Moreover, with the exception of the act of *mancipatio*, all the other means which civil law recognized for the acquisition of the Roman *dominium* were common both to things *mancipi* and to things *nec mancipi*.³ The *res nec mancipi* participated, therefore, in the *jus civile*, and were capable of Roman proprietary right; provided, of course, they were not stamped with the character of *peregrinitas*.

The only one of these acts regarding which there is a distinction between these two classes of things is *mancipatio*. And this is the reason, therefore, why some are called *res mancipi* or *mancipii*, things of mancipation; and the others *res nec mancipi* or *nec mancipii*, things not susceptible of mancipation.⁴

125. The jurists gave the precise enumeration of the things

¹ Gai. 1, § 192. "The most valuable of all" (*alienatis pretiosioribus rebus*), adds the jurist.

² Gai. 2, § 47.

³ For instance, *usucapio*, which certainly was a means of acquiring the *dominium*; also the *in jure cessio*, the formula of which exactly expresses the idea, "*Hunc ego hominem ex jure Quiritium meum esse aio*;" also the *adjudication*, the legacy, and the inheritance. See Ulp., *Reg.*, 19, §§ 8, 9, 16 and 17, where this is repeated positively each time.

⁴ Everything proves this, and Gaius asserts it directly: "*Mancipi vero res (sunt) quæ per mancipationem ad*

alium transferuntur; unde . . . mancipi res sunt dictæ." *Mancipium*, from one or the other of the two etymologies given to this word, whether, as we think, "to take with the hand," or "to put the hand on the head to signify the act of purchase," *mancipium* is invariably, and above all, the judicial act itself, the *mancipatio*. It is only by figure of speech, and consequently an addition of later times, that the same word came to be employed to signify the effect produced by that act—*proprietas*. Thus *res mancipi* is a thing of mancipation, not a thing of Roman *dominium*.

which were *mancipi*, and we find it still in the fragments of Ulpian. At that epoch this classification included ;

1°. Hereditaments in the *solum Italicum*, plots of land or houses ;

2°. Rural servitudes (but not urban), of course as to the same class of land ;

3°. Slaves and those animals *quæ dorso colloque domantur* ; that is to say, beasts of burden and draught.¹

126. Thus, as to the soil and the buildings upon it, there was no distinction ; all soil participating in the *jus civile* was *res Mancipi*. This characteristic kept even pace, in its growth and extension, with the *jus civile* and the *commercium*. At first confined to the *ager Romanus* or Roman soil, it was gradually extended to the soil of the colonies, to that of Latium, and to that of all Italy. Beyond that limit it did not pass except to countries to which it was granted by particular concession, in the shape of the *jus Italicum*. As to incorporeal things, they were all *res nec Mancipi* ; for a creation of the law, a legal abstraction, cannot be grasped by the hand. However, an exception was admitted in favour of rural servitudes, which were identified with the land, to the enjoyment of which they were subservient, and the origin of which is very ancient ; the isolated position of Roman houses (*insulæ*) having necessarily made urban servitudes more rare, and their origin of later date.

The wish to escape from the rigour of the civil law caused also the expectant patrimony, in its entirety (*familia pecuniaque*), to be considered susceptible of a fictitious mancipation.²

Finally, as to movables, but only those with which the primitive Romans were acquainted, the character of *res Mancipi* followed them wherever they went. The wife, the children and the freemen under the power of the chief on the one hand, the slaves or beasts of burden and draught on the other, alone bore this character. As civilization progressed, elephants and camels were brought to Rome, but bearing in their very aspect an alien character, they remained under the category of *res nec Mancipi*.

¹ Ulp., *Reg.*, 19, § 1. Compare Gai. ² Gai. 2, §§ 102 and 104.
2, §§ 25 et seq.

127. To sum up,—for a thing to be *res Mancipi* it must be susceptible of civil rights and their corresponding obligations; such was not the case with either foreign soil or things. It must be capable of being grasped by the hand, for it is the essential element of mancipation *manu capere*. And this excluded all incorporeal things, except the most ancient servitudes: the rural, which were identified with the land, and the patrimony (*familia*), which by a fiction was also treated as a *res Mancipi*.

Finally, it must have a peculiar and distinct individuality in order that the citizens who took part in the legal act, and who were taken to witness the acquisition of the Roman *dominium* of the thing, might be able to attest its identity.

This character of individuality is only recognized to an extent sufficient to admit of mancipation in two classes of objects: in the soil, and in animated beings, freemen, slaves or animals; and even among the latter only in those tamed by man and associated with him in his labours, for they alone, in fact, have, as regards man, a real individuality capable of identification. In a state of nature their identity is less distinctly marked.

128. The soil, men, and animals broken in for purposes of human labour, were *res Mancipi*—all of them things which had received their existence from God. None of them are created by man,¹ for man cannot impress individuality on the work of his hands, nor impart existence itself to the things he fabricates. This philosophical idea of the nature of things was derived from nature herself by the primitive Romans, who were not a manufacturing people, and amongst whom, consequently, the mechanical products of human genius and art did not come into rivalry with the works of God.

Of the head of the Roman family, the soil with the house upon it,² the wife, children, the men under his power, and the

¹ For buildings are *Mancipi* only because they make one body with the soil, because they are an adhesive part of it; once detached from the soil they lost this character.

² The working instruments of the farm, which the Romans called the

instrumenta of the field, as long as they were incorporated with it by a perpetual use became immovables like the soil to which they belonged. In such a condition, attached to the soil, they were *res Mancipi*, but separated, they were *res nec Mancipi*.

animals broken in for his work, were the *res Mancipi*; things whose individuality was merged in the chief, and which were at the same time, under ordinary circumstances, things he most valued, which could not be alienated by simple tradition, and to which was exclusively applied the symbolic act of *mancipatio*. In spite of the progress of civilization, the cultivation of the arts, and the acquisition of ever fresh means of wealth and luxury, the *res Mancipi* never increased in number. Stamped with their peculiar characteristics by the old Roman law, they underwent no change.

129. But to assert that every other thing, everything *nec Mancipi*, was without the pale of the *jus civile* and not susceptible of Roman *dominium*, is irreconcilable with the whole theory of the law and the social status of the Romans.

This opinion is refuted on all sides.¹ *Res nec Mancipi*, provided that they are Roman and not without its jurisdiction, enjoy all the privileges of the *jus civile* except *mancipatio*.

130. The importance of the distinction between *res Mancipi* and *res nec Mancipi* varies with the period. As the old *jus civile* disappeared, as the characteristic features of Quiritarian *dominium* became effaced, as *mancipatio* fell into disuse, the distinction between things *Mancipi* and *nec Mancipi* also died out. Under Justinian it was nothing but a meaningless phrase. Disuse had abrogated it in fact; the emperor abrogated it formally:

¹ See above, § 124, note 4, where are given the legal means of acquiring Roman *dominium* in things *nec Mancipi* as well as things *Mancipi*. Vide Gai. 2, § 196, and Ulp. 24, § 7, who both agree in alluding to things *nec Mancipi* as subject to the *dominium ex jure Quiritium*. This opinion can only be supported by admitting the

hypothesis that, from the origin of the distinction between things *Mancipi* or *nec Mancipi*, there had been two kinds of *proprietas*, one Roman and the other not. But Gaius has distinctly overthrown this hypothesis, by telling us that originally there was but one *dominium*,—that one was proprietor according to the Roman law, or not at all.



§ IV. IN RELATION TO THE PROPRIETOR.

SECTION XLII.—RES OMNIUM, PUBLICÆ, UNIVERSITATIS, SINGULORUM, NULLIUS.

131. First. Common things (*res communes omnium*), such as air, running water, the sea and its coasts, which may be used by everyone, but which are susceptible of being bought by no one, except in fragments :

Second. Public things (*res publicæ*), of which the property is in the people, but of which the condition is of two sorts according, 1st, As the use is common to all members of the people, like that of public thoroughfares, of rivers, of ports ; or, 2ndly, As they are worked and employed by public authority for the profit of the State in general, as fields, revenues, public slaves. In this last case, these things are said to be *in pecuniâ, in bonis, in patrimonio populi* :

Third. *Res universitatis* belonged to communities, colleges or corporations ; with regard to these we must make a distinction analogous to that of the preceding case :

Fourth. *Res singulorum*, which were the property of particular persons :

Fifth. *Res nullius*, or things which belong to no one. This expression in the most restricted sense designates things which have no proprietor ; either because man has not yet taken possession of them, as wild animals, their products, shells, sea wrack, grass, islands rising in the sea, &c. ; or because man has abandoned them (*res pro derelicto habitæ*) ; or because his ownership has ended without that of any other having succeeded to it, which is the case, in the Roman law, of inheritance so long as the heir has not yet acquired it.

But this class does not stop here ; it is capable of being generalized, and is considered by jurists to comprise : 1st, Things of divine right, which are outside and independent of men's dealings ; 2nd, Common things, which are nobody's property ; and 3rd, Public things and things of the commonalty, as they belong to no private individual, they are supposed, as the Roman jurists say, to belong to no one.

SECTION XLIII.—THINGS IN OUR PATRIMONY (*Bona*), OR OUT OF OUR PATRIMONY.

132. Thence arises that general division under which all the distinctions we have just mentioned can be arranged, as subdivisions:

Things which belong to nobody, *res nullius*; and inversely things which belong to somebody, *res alicujus*;

Or, what amounts to the same, things in our patrimony (*in nostro patrimonio*) and things out of our patrimony (*extra nostrum patrimonium*).

The first expression is from the Institutes of Gaius;¹ the second from the Institutes of Justinian.²

The things (*res*) considered as being in our patrimony take the special name of goods (*bona, pecunia*).



SECTION XLIV.—PUBLIC LAND, PROPERTY OF THE STATE (*Ager Publicus*); PRIVATE LAND, PROPERTY OF INDIVIDUALS (*Ager Privatus*).

133. To this theory we must refer, in the historical study of Roman law, what concerns:—

1°. The *ager publicus*, and, inversely, the *ager privatus*; a distinction separating the soil or territory into two parts,—the one reserved to the people or to the republic, the other given up to ownership and to the dealings of private individuals. The *ager publicus*, that is to say, the territorial property of the state (which we must take great care not to confound with the *ager Romanus* or original Quiritarian soil), increased in extent in proportion to the conquests of Rome. The lance was the instrument, the type and symbol of acquisition; the expropriation of the territory of conquered nations was the law of war; all the soil which was not conceded to them by the supreme power on better conditions became in principle *ager publicus*, which, in course of time, came to comprise the whole known world.

¹ Gai. 2, § 9; Dig. 1, 8, *De dicis*.
rer., 1, pr. f. Gai.

² Inst. 2, 1, pr.

2°. The distribution, the enjoyment, the management of the *ager publicus*, in the name of the republic, whether the conquered territory was sold in lots by auction, or gratuitously distributed by lots to the people, and, in later times, exclusively to the soldiers and veterans, led to the establishment of colonies. In either case, the transfer conferred proprietary rights and passed the land into the category of *ager privatus*, to which civil rights at once attached: whether it remained open and free to any citizen who might choose to occupy, clear and cultivate it, either paying a rent or not; or whether finally the land was farmed by *emphyteuticarii*, or even held on sufferance; or whether it had been seized by the powerful patrician families, who were in the habit of thus possessing themselves of large tracts, which they enjoyed as inheritances, but for which they paid no species of tax. Thence came the distinction of the lands, as into *agri quæstorii*, in the first case; *assignati*, in the second; *occupatorii*, in the third; *vectigales*, in that where a rent was due to the public treasury; and, in general, *subcisivi*, in those cases where it remained in the *dominium* of the state after the distribution of the conquered territory. The frequent disputes which occurred about the division, the management or the possession of lands, and about the successive encroachments which the patricians made on them, about the agrarian laws, and the laws of the Gracchi and of subsequent times, had reference to the *ager publicus*.

3°. The condition of the soil in the provinces, where the land, unless there had been a privileged concession of the right of property or a communication of the civil right, was in principle that of *ager publicus*, the property of the Roman people, even when it had been left *de facto* to the disposal of private persons. Those particular holders, according to the strict letter of the law, were not proprietors; they were considered as having in some sort only the possession and the usufruct of it, subject to the revenue charged upon the land.¹ And therefore the land in the provinces was called *possessiones*, and not property. The only proprietor was the Roman people. Therefore neither the

¹ "Nos autem possessionem tantum et usum fructum habere videmur." Gai. 2, § 7.

Roman *dominium*, nor the operation of civil law which sprung from it, could have any application to that soil.

4°. At a later period the provinces were divided into *provincia populi Romani* or *prædia stipendiaria*, also called senatorial provinces, and the *provincia Cæsaris* or *prædia tributaria*.¹ In like manner the treasury was divided into the *ærarium*, or treasury of the people or senate; and the *fiscus*, or treasury of Cæsar. In proportion as imperial power increased, that of the people and the senate declined, till ultimately the emperor was all in all.

§ V. THINGS CONSIDERED PHYSICALLY AND LEGALLY.

134. The physical nature of things must to a certain extent be considered by the legislator. The Roman law did not accurately classify things in this respect; it did not, however, altogether overlook natural characteristics.

SECTION XLV.—MOVABLE THINGS (*Res mobiles, seu moventes*) OR IMMOVABLE (*Res Soli, Immobiles*).

135. Although this distinction of things into movable and immovable did not form in Roman law, as it does in the French, the fundamental basis of the twofold division of things, it was, nevertheless, not without importance.

It arises as much from the provisions of the law as from the expressions used by jurists; and we find the distinction indicated by Ulpian, with the technical forms of Roman law which are to be found also in the fragments of several other writers.

Res mobiles, or *res se moventes*, or simply *moventes*, signify movable things, according as they are inanimate or animate objects.²

¹ Gai. 2, § 7, and 2, § 21.

² Dig. 21, 1, 1, pr. f. Ulp. See also Vat. J. R. Frag., §§ 293 and 311; Dig. 33, 10, 2, f. Florentin.; 42, 1, 15, § 2,

f. Ulp.; 48, 17, 5, § 1, f. Modestin.; 50, 16, 93, f. Cels.; Cod. 1, 3, 49, § 2, const. Justinian, etc.

Res quæ soli sunt, or *res soli*, signify immovable things;¹ or, as Ulpian in several places has it, *res immobiles*;² and Justinian, in one of his constitutions, says, *quæ immobiles sunt, vel esse intelligentur*;³ but the same objects are described more frequently by the particular designations of *prædia*, *fundi*, *ædes*.

Lastly. There are also things which, although movable by their nature, are considered, in legal estimation, as immovable, because, either on account of their adherence to an immovable thing (*vincta, fixa*), or on account of their being destined to its perpetual use (*perpetui usus causa*), they make a single body with it, and so they are considered as making a part of it and sharing its nature.⁴

136. Incorporeal things, being mere legal abstractions, were neither movable nor immovable; nor did Roman law, as have certain modern systems, ascribe to them either of these attributes. However they might at times be so attached to an immovable, as in a certain sense to form a part of it: such was, for example, the case with servitudes.⁵

137. The distinction between movables and immovables, although less important in Roman legislation than among the moderns, was nevertheless, from the very earliest times, followed by effects in the relations of both public and private life.⁶

¹ Dig. 21, 1, *De ædil. edict.*, 1, pr. f. Ulp.

² Ulp., *Reg.*, 19, §§ 6 and 8.

³ Cod. 7, 31, *De usuc. transf.*, const. Just.

⁴ Dig. 19, 1, 13, § 31, f. Ulp.; 15, f. Ulp.; 17 pr. and §§ 7 to 11, f. Ulp., etc.

⁵ Dig. 18, 1, *De contrah. empt.*, 47, f. Ulp.

⁶ The following enumeration, to which something could still be added, will show that it is erroneous to suppose that the distinction between movables and immovables did not exist in Roman legislation. We find this distinction clearly recognized:—

1st. In the political constitution and the communication of civil rights to soil.

2nd. In the regulations on booty:

the soldier may acquire individually the movable booty he takes, but not the soil, which becomes public.

3rd. In the time fixed for *usucapio*, according to the XII Tables themselves. (Ulp., *Reg.*, 19, § 8; Gai. 2, § 42.)

4th. In mancipatio, whether as to the presence or as to the quantity or number of things that could be mancipated. (Ulp., *Reg.*, 19, § 6.)

5th. In the ancient *actio sacramenti*, in the case where immovables and things incapable of transportation, *in jus*, required the additional solemnity of the *deductio*. It is true that this was not confined to the fact that the thing was absolutely immovable, but extended to cases where the transport would be attended with difficulty.

6th. In dower, according as movable or immovable dower was in question

SECTION XLVI.—THINGS DIVISIBLE OR INDIVISIBLE—PRINCIPAL OR ACCESSORY.

138. I shall merely point out those two divisions which are not considered by Roman jurists in the light of a methodical classification, but which are nevertheless often followed with important effects in law.

1°. Divisible things, which can be separated into several parts, either physically and corporeally (*partes certæ—pro diviso*); or parts in a sense purely juridical, mathematical and intellectual fractions, as one-half, one-third (*partes incertæ—pro indiviso*);¹ and indivisible things, which do not admit, in law, the idea of any division or of any part being distinct from the whole.²

2°. Principal things (*res principales*) and accessory things, that is to say, things forming a dependent and subordinate part of the principal thing, called by the Romans simply *accessiones*, and with regard to which Ulpian laconically lays down the following rule, which, however, requires some discernment in its application: *accessio cedat principali*.³

(*prædium dotale*). (Paul, *Sent.*, 2, tit. 21; Gai. 2, § 63.)

7th. In the theory of theft, which the jurists declare cannot be applied to immovables. (Gai. 2, § 51; Dig. 47, 2, 25, pr. f. Ulp.)

8th. In the interdict *utrubi*, for movables, being quite different from the interdict *uti possidetis*, for the immovables. (Gai. 4, §§ 149 and 150; Paul, *Sent.*, 5, 6, § 1; Instit. 4, 15, 4.)

9th. In real servitudes, which, from the very nature of things, apply to immovables, and cannot exist in reference to movables.

10th. In several cases in which the law prescribes the sale of movables before that of immovables; for instance, in the case of pledges. (Dig. 42, 1, 15, § 2, f. Ulp.; 48, 17, 5, § 1, f. Modestini.)

11th. In sales and in legacies, when the question is to determine what follows the immovables sold or bequeathed,

as being a part of them whether by adherence or destination. (See the title *De actionibus empti et venditi* (Dig. 19, 1), and the various titles *De legatis* (Dig. book 30, 31, 32), in which a great number of fragments have a reference to that question.)

12th. In legacies, when the testator has bequeathed his movables, and when the question is to determine what is comprised in such a legacy. (Dig. 50, 16, 93, f. Cels.)

¹ Dig. 50, 16, 25, § 1, f. Paul; 7, 4, 25, f. Pomp.; 8, 2, 36, f. Papin.; 45, 3, 5, f. Ulp.; 6, 1, 8, f. Paul; 8, 4, 6, § 1, f. Ulp.

² Dig. 8, 1, 17, f. Pomp., *Prædial servitudes*; 21, 2, 65, f. Papin., *Pledge*. See 45, 1, 2, §§ 1 et seq., f. Paul.

³ Dig. 34, 2, 19, § 13, f. Ulp. V. Dig. 22, 1, *De usuris et fructibus et causis et omnibus accessionibus*.

SECTION XLVII.—GENUS AND SPECIES—THINGS WHICH ARE DETERMINED BY WEIGHT, BY NUMBER OR BY MEASURE (*quæ pondere, numero, mensurâve constant*)—OF SO CALLED *Res fungibiles*—THINGS *quæ ipso usu consumuntur; quæ in abusu continentur*.

139. It is an important distinction, and one which often recurs among Roman jurists, whether a thing is described in law generically, as a slave, a horse, some wine, some oil of a certain quality, or by its very individuality, as such a horse, such a slave, the wine, the oil contained in such a vase. In the former case, the Romans called the thing *genus*, a kind, in the latter *species*, a species; that is to say, an individual thing, an ascertained object.¹ This distinction is attended with important consequences as to the nature, the extent and the loss of the rights relative to the object.² It can be applied even to coined money, as a certain sum of money, or the money enclosed in a certain box;³ and, inversely, even to the soil, as being so many measures of land in a certain territory or a certain spot.

140. It is evident, in the first place, that a thing considered *in genere* is only determined by number, by weight or by measure of the fixed kind and quality; whilst that which is considered *in specie* is appreciated by its kind, by its very individuality.

There are things which, by their very nature, are commonly appreciated in the first manner; such as wine, oil, wheat, money, metals. The Romans designated them by these expressions: *quæ pondere, numero, mensurâve constant*.⁴ There are others, on the contrary, which are generally appreciated by their individuality as being certain things of their kind; such are slaves, horses, movable instruments, fields, &c. But it is a very frequent error to confound custom with right. We have just seen that both these classes of objects can, according to the intention of the parties, be considered either one way or the other, either in conformity with or in exception to their ordi-

¹ Dig. 45, 1, *De verb. oblig.*, 54, pr. f. Julian.

² For example, Dig. 45, 1, 37, f. Paul.

³ Dig. 30, 1, *De legat.*, 30, § 6, f. Ulp.

⁴ Inst. 3, 14, pr.; Dig. 12, 1, *De reb. cred.*, 2, § 1, f. Paul.

nary nature, provided that nature is not absolutely repugnant to it.

141. It is evident, in the second place, that things considered *in genere* may be used and interchanged one for the other. It does not matter which is given, provided it is of the same quality and quantity (*in eadem qualitate et quantitate*), since it is to be appreciated only by number, weight or measure. Whilst the thing, considered as species (*species*), is to be used and to be given individually; any other is neither the same nor the equivalent. Paul has said, speaking of things of this kind, "*In genere suo magis recipiunt functionem per solutionem, quam specie.*"¹ Hence has sprung the distinction between *res fungibiles* and *res non fungibiles*, a barbarism which belongs neither to the law nor to the language of the Romans.² It is clear that the distinction agrees completely with that between *genus* and *species*.

142. Lastly, there is a class of things which the Romans described as *quæ ipso usu consumuntur*,³ which are consumed in using, or, as Cicero and Ulpian say, *quæ in abusu continentur*,⁴ in opposition to those, *quarum salva substantia utendi fruendi potest esse facultas*,⁵ from which it is possible to derive service though preserving their substance.

The former class is ordinarily considered *in genere*, and it is in the nature of objects of this class to be capable of being substituted for one another, since they are generally utilized only by their destruction. The owners, however, might have considered them otherwise, as ascertained objects for every purpose for which they might be used without their being destroyed,—a rare occurrence, it is true, nevertheless it is a possible case.⁶ So, on the other hand, things which are not consumed by use might be treated by the parties, for some exceptional purpose,

¹ Dig. 12, 1, 2, § 1, f. Paul.

² *Res fungibiles* are defined as things which can be used by substitution, that is, one for another, *quarum una vice alterius fungitur*.

³ Instit. 2, 4, § 2.

⁴ Cic., *Top.*, 50; Ulp., *Reg.*, 24, § 27.

Abusus from *abutor*, to consume by the using, exhaust.

⁵ Ulp., *Reg.*, 24, § 26.

⁶ Dig. 13, 6, 4, f. Gai.; 16, 3, 24, f. Papin.; 30, 1, 30, §§ 6 and 34, § 4, f. Ulp.; 45, 1, 37, f. Paul.

as things that are. The question therefore is, was the object in question regarded *in genere* or *in specie*?



§ VI. IN RELATION TO THEIR COMPOSITION OR AGGREGATION.

SECTION XLVIII. — A PARTICULAR THING (*Res singularis*)— (*Rerum universitas*).

143. This distinction is given to us with some details by Pomponius. "There are three classes of things," he says; "one which is self-contained, as in a single being (*uno spiritu*), which the Greeks name *ἡνωμένον*, that is to say, unique (*unitum*), such as a man, a tree, a stone and other similar objects." Those objects are generally called, in Roman law, by all the jurists, *res singulares*, individual, particular things.

"The other, which is formed of various adherent bodies, connected together (*ex contingentibus*), and which are called *συνημμένον*, that is to say, connected (*connexum*): such are an edifice, a ship, a cupboard, composed of stones or of planks connected together." We sometimes find these different objects called in the text-books *universitas*.¹

The third class consists of various distinct objects, separated from one another (*ex distantibus*), but united together under the same name (*uni nomini subjecta*), as composing a single whole.² Such are a flock (*grex*), either of oxen (*armentum*), or of horses (*equitium*), or of slaves, comedians or a chorus, which comic poets, in their prologue, always speak of as our flock (*grex noster*): such are, again, a shop furnished with its goods (*taberna*); a cellar with its barrels, its bottles and its *amphoræ*; a farm with its working instruments (*fundus instructus; cum instrumento*).³ This class of things is always expressed in Roman law as *rerum universitas*, or simply *universitas*. It is, definitively, a quantity, an aggregation of distinct things, united under the same name.

¹ Dig. 10, 2, 80, f. Modest.; 41, 2, 30, pr. f. Paul.

² Dig. 41, 3, 30. It is the fragment

of Pomponius which we have partially quoted in the text.

³ Dig. 7, 1, 70, § 3, f. Ulp.; 21, 1, 84, f. Afr.

Among these aggregations, there are some which exist, not physically and in fact, but in law; which can embrace in their entirety, not only material objects, but incorporeal things, active or passive rights: such are the *peculium*, either of the slave, or of the son of the family; the *dos*, and, above all, the inheritance which comprises the entire corpus of the goods and of the rights left by the deceased. These things are essentially *universitas*.¹

144. In short, we distinguish between individual or particular things (*res singulares*), and the universality of things (*rerum universitas*, or simply *universitas*), an expression which in law is open to latitude or may be restricted.

The legal effects resulting from these different classes of things are important.

ARTICLE THIRD.

III. OF FACTS.

145. Here the method of the Roman jurists almost completely fails us. We are now coming to a third element, which their system has not realized or at least properly classified, although it is everywhere to be found in law. We have had the subject and the object of rights; let us now consider the cause, the generating element.

§ I. COMPONENT IDEAS.

SECTION XLIX.—IDEA OF FACT.

146. The word *factum*, fact or act, from *facere*, to make, might, by its etymology, appear to be confined to human acts;

¹ Dig. 5, 3, 20, § 10, f. Ulp.; 37, 1, 3, pr. f. Ulp.; Dig. 43, 2, 1, § 1, f. Ulp.; 50, 16, 208, f. Afr.; Inst. 2, 9, § 6; Dig. 15, 1, *De pecul.*, 32, pr. f. Ulp. Commentators have called the former

universitas facti, and the latter *universitas juris*. We know that inheritance is, besides, in certain cases, personified. It is the same with the *peculium*. Dig. 15, 1, 40 Marcian.

it is, however, accepted in legal as well as ordinary language, with the Romans as with us, in its widest sense, as designating any event whatever which has occurred within the scope of our perceptions.¹

An act (*factum*) may be entirely independent of a man, such that he could neither produce nor aid in producing, nor prevent; or it may be the result of the direct or indirect co-operation of man, or, lastly, the immediate result of his will.

The idea and the word *factum* are even applied to the very negation of the fact, as in the case in which a certain event will not occur; or the omission or the refusal on the part of a man to act or do.² That is what is commonly called a negative fact.

Lastly, in the same way as law, by its power of abstraction, creates persons and things which do not exist in nature, so it sometimes goes so far as to create imaginary facts which have no reality, and to act as if they had.



SECTION L.—THE SUBJECT OF THE ACT.

147. The person himself may be the subject of the act: for instance, his birth,—from which arises a fact of filiation for one, of paternity or of common origin as to others; his marriage, the legal or illegal union of one sex with the other; the stages of a man's age; his illness, changes in his corporeal or moral organization, produced by nature, by accident or by violence; finally, his decease:

Or these changes may affect things, for instance, their creation or composition; their embellishments, ameliorations, deteriorations, transformation, subtraction, loss or destruction:

Or, lastly, they may bear on both combined, as in the relations of man to things; for instance, the occupation, the taking or the loss of possession of a thing by man.

All those acts, positive or negative, produced by one cause or by another, bearing on one object or on another, all intervene

¹ It can be seen thus used by the Roman jurists in the whole title *De juris et facti ignorantia*. Dig. 22, 6.

² For instance, Dig. 45, 1, 7, f. Ulp.

in law, no doubt, with different results, according to circumstances, but always in the same direction in the same function.



SECTION LI.—ACTS CREATE RIGHTS.

148. This principle is an active principle. If rights arise, if rights are modified, if they are transferred from one person to the other, if they are extinguished, it is always in consequence or by means of an act.

There is not a single right that does not proceed from an act, and it is precisely from the variety of acts that arises the variety of rights.

149. Thus the labours of the jurist belong not to the region of speculation but to the world of fact. All facts, whether they have relation to nature or to dealings between man and man in political or private life, are the especial province of the jurist, they are the causes whose effects he traces in the development of rights and the elaboration of the good and the equitable, which act and react on the basis of facts, subserving while they control their course and character. It is therefore indispensable to a logical consideration of every legal question accurately to determine, either in hypothesis or reality, the notion of fact.



§ II. *LEGAL FACTS OR ACTS.*

SECTION LII.—*IDEA OF THE LEGAL FACT OR ACT.*

150. There are certain acts whose special aim is to establish legal relations between persons,—to create, to modify, to transfer or to annihilate rights.

The law, therefore, has by the exercise, so to speak, of a certain faculty of prescience regulated and classified them, individually in some cases, generically in others, according to their nature, their form and their effects.

Such are, for instance, the manumission of slaves, the eman-

cipation of the sons of a family, marriage, adoption, wills and testamentary acts, the various kinds of contract and many others, which can only be properly appreciated by the knowledge of the rights to which they refer.

These are the acts that we designate by the general but not Roman qualification of legal acts.

SECTION LIII.—THE FORM OF LEGAL ACTS.

151. The number and the quality of the auxiliary persons who are to concur in the legal act, the time and the place where it is to occur, the words which must be pronounced in it, the gestures and exterior actions which must accompany it, the writings or the suitable means to preserve the remembrance of it, are the elements which are comprised in the idea of the form.

152. Certain legal acts have a strictly-defined necessary form, from which they derive their validity, and without which they do not exist; and this prescription may be confined to one or more of the constituent elements of the form, or may extend to the whole.

Other acts require no specially prescribed form. Provided they take place, and are authenticated, it is sufficient.

153. With respect to the former, to those which have a form rigorously prescribed, there are some in which the state itself must intervene either indirectly, through the co-operation of some magistrate, or directly, in the *comitia*, replaced at a later date by the imperial power; there are others, on the contrary, the accomplishment of which is left to simple individuals, who only ask the intervention of citizens.

SECTION LIV.—SPECIAL CHARACTER OF THE ROMAN LAW WITH RESPECT TO LEGAL ACTS.

154. Civilization as it advances has a spiritualizing influence on institutions as well as on the whole domain of human life: it

disengages them from the material and carries them more and more into the region of the immaterial, and endows them with a soul, with intelligence. This is especially the case with legal acts: they become, through the influence of civilization, animated with a mind, a will, intention; while all that is required from the material are the means of demonstrating and guaranteeing what the will demands.

In the early stage of civilization human nature is more closely wedded to the material. The dominion of the senses, of the body, of physical impressions, is more powerfully exercised than the intellect. In legal acts the predominant force is not therefore the mind or the intention, it is the form; for the form is the material, the visible manifestation of the will, the corporeal element by which thought is expressed.

155. In early stages of civilization, therefore, men do not adopt the simple and easy method of recording and transmitting the recollection of an event, viz. by writing: the transmission must be effected direct through other means. Even if the art of writing were known, it would not possess the confidence of those who could not appreciate its value. Under such a condition, therefore, it becomes above all most necessary that a profound impression should be made on the mind through the medium of the senses.

The will, like every immaterial element, is not to be discerned except by its effects. It crosses thought, it comes, it disappears; it is modified by an instantaneous process. If we would enchain it, we must clothe it with a physical, a corporeal existence; and when once the material has been affected, the act accomplished, the immaterial will, so far as regards that individual act, cannot be recalled to its original immaterial condition.

156. But it is clear that the material which is to give to legal acts a sensible form will be influenced by the prevalent and predominant idea of the age or condition to which they belong. This idea will be that of analogy, the predominant idea of infancy, whether in a people or an individual. The material element, then, or, in other words, the external actions

or gestures which are to give expression and form to legal acts will be framed on the principle of analogy, in accordance with the end to be attained, with the right which it is wished to create, to modify, to transfer or to annihilate, or with something having reference to it in popular belief.

Thence the transition to symbol is easy, for symbol is nothing but analogy clothed in corporeal form and expressed by action.¹ But, besides this, these acts, these symbolical objects have often been in themselves a real element in the act, and have only become fictitious and purely symbolical through the lapse of time. Thus, among the Romans, the scales and the piece of brass (*æs et libra*), vestiges of the primitive times when, for want of public money, metal was measured by weight,² became symbols in the solemn sales of the Romans (*nexum, Mancipium, Mancipatio, alienatio per æs et libram*), and were used, though mere fictions, in a multitude of cases where the real purpose was no longer that of sale.³ Thus in suits for claiming property, *rei vindicatio*, the *manuum consertio* would be the symbol of a battle between the two disputants, perhaps the real process originally;⁴ the lance, *hasta*, would remain the symbol of Roman ownership among a warlike people, with whom war was eminently the means of acquisition; a rod (*vindicta, festuca*) would become, in its turn, the symbol of the lance,⁵ and this

¹ In M. Ortolan's course of lectures of the years 1839-1840, on "A Historical Introduction to the Science of comparative Penal Legislation," he has shown what prodigious influence has been exercised on the penal institutions of European nations by the idea of analogy which is materialized in symbol.

² "Populus romanus ne argento quidem signato, ante Pyrrhum regem devictum usus est. Librales (unde etiam nunc libella dicitur et dupondius) appendebantur asses. Quare *æris gravis* poena dicta. Et adhuc *expensa* in rationibus dicuntur; item *impendia et dependere*. Quin et militum *stipendia*, hoc est stipis pondera; dispensatores *libripendes* dicuntur. Qua consuetudine, in his emptionibus, quæ Mancipii sunt, etiam nunc libra interponitur." Pliny, *Hist. natur.*, 33, 3. See below, as to *mancipation*, tit. ii., *Inst.*, lib. ii. introd. How many words are derived

from that custom of weighing metal (*pendere*), and even in our own times, to *expend, expense, stipend*.

³ Thus, from mancipation symbolically used are deduced: the emancipation of children; the acquisition of marital power over women; the will; the enfranchisement of women from the guardianship of their agnates or of their patron (Gai. 1, § 195); the extinction of certain obligations (Gai. 3, §§ 173 et seq.); the pledging of the goods and formerly even of the person, as a guarantee for a debt (*nexum*, in its most special acceptance).

⁴ Aul. Gell. 20, 10.

⁵ "Festuca autem utebantur quasi hastæ loco, signo quodam iusti domini; maxime enim sua esse credebant, quæ ex hostibus cepissent: unde in centumviralibus judiciis hasta præponitur." Gai. 4, § 16.

form continued to be used as a mere fiction in a great number of cases where the real object to be attained was quite different from that of having a contest decided. Thus the glebe of the field (*gleba*), the tile detached from the edifice (*tegula*), we see were taken to the prætor to accomplish, by these symbols of the immovable property which was the subject of litigation, the formalities which in former times were transacted on the spot itself. Thus when the thirty curies no longer met, thirty lictors were the symbol representing them, and certain legal acts which ought to have been done by the *comitia* were done before the axe of the lictors instead. Early Roman law was full of these gestures and symbols, which were necessary to give effect to legal acts.

157. The acts, the exterior gestures, were accompanied by words, and here we find the same spirit prevailed. These words were consecrated formulas, the national language alone being used: one expression substituted for another would often change the effect of the act, or would annihilate it. Solemn interrogations were addressed to the parties, to the witnesses, and to all who took part in the transaction. Solemn answers had to be given by them, and all these forms, with the words of the questions and answers spoken aloud, were calculated to make an indelible impression on the minds of those who took part in and witnessed them.¹

158. In the early period of the civil law writings were never used; everything was done verbally, and the terms made use of were words consecrated and set apart for that particular purpose. When in after times writing came to be used, it was, with one solitary exception, introduced as a mere precautionary measure, the better to fix the act in the memory, but not as essential to its validity. Some time elapsed before the prætorian law and imperial constitutions required parchments, tablets, signatures, seals for wills, or insertion in the public registers.

¹ We have retained the practice of one of our own most important rites,—solemn interrogation and answer in marriage.

159. It is curious to note the transformation which these legal acts underwent in the course of time. The symbol ceased to be understood and appeared only a ridiculous hindrance ; its application in judicial procedure was already, in the sixth century of Rome, an object of public hatred (*in odium venerunt*), says Gaius.¹ The *lex Æbutia* and the *leges Juliæ* (of Julius Cæsar and of Augustus) suppressed them almost entirely. Cicero turned them into ridicule,² and modified ceremonies and formulas for wills became popular in the time of Augustus (*quod popolare erat*),³ when *fideicommissa* and codicils were introduced. The system of prætorian administration successively mitigated the harsh consequences of subjection to forms. Constantine II., Constans and Constantius, while admitting the necessity of questions and answers and of words, and permitting their use to remain, denuded these words of the sacred character with which they had been invested, and denounced them as verbal snares laid to entrap people.⁴ The Greek language rose to a level with the Roman, and the old system was finally effaced by Justinian, and legal acts were reduced to their plain and simple character.

160. This description, however, is by no means exclusively confined to the history of Roman civilization. The same phenomena are to be observed in the history of more than one nation. We may trace the same character in the institutions of several European states ; and if we study the times which Vico calls the return of the barbarous age we shall discover the same features there. This is the principle upon which the Neapolitan philosopher conceived the idea of that never-ending cycle to which he condemned all human affairs (*il ricorso delle cose umane*). Happily it is but a dream, for human nature, except under an occasional impulse which turns it out of the direct path, pursues an onward course towards improvement. Its progress is straight forward, and not, as the dream of the philosopher would tell us, in an ever-recurring cycle.

¹ Gai. 4, § 30.

² Cic., *Pro Murena*, 12.

³ Instit. Just. 2, 23, 1.

⁴ "Juris formulæ, aucupatione syl-
labarum insidiantes cunctorum actibus,
radicitus imputentur." Cod. 2, 58, 1.

SECTION LV.—ACTS OF CIVIL LAW—ACTS OF THE LAW OF NATIONS.

161. By the side of the legal acts, regulated by the *jus civitatis* and exclusively adapted to the citizens, there were some which had for their special object the creation, the modification or the extinction of certain rights, but which were recognized as belonging to the *jus gentium*, or common to all men. These were not restricted to the forms and ceremonies peculiar to the *jus civitatis*. They could take effect between citizens, between strangers or between one and the other reciprocally. These were the acts of which the *prætor peregrinus* and the presidents of the provinces took cognizance.



SECTION LVI.—ONE CITIZEN COULD NOT BE REPRESENTED BY ANOTHER.

162. This important principle, that the person of one citizen could not be represented by another in legal acts, will serve as a key to a great number of the provisions of Roman law.

The chief of the family, however, could be represented in many cases by his slaves, by the sons of the family, by those who were under his power, because they all bore the same legal *persona*.¹ With this exception no one citizen could represent another.

163. In course of time, however, this principle was modified, and a distinction came to be made between acts under the *jus civitatis* and those under the *jus gentium*. Expediency demanded that transactions should be facilitated² and performed by means of a procurator or business agent. And although, strictly speaking, the consequences of the act devolved upon

¹ It was thus that they sometimes obviated the impossibility of accomplishing legal acts for the chief of the family when he was *infans* (unable to speak): one of his slaves would take a part in the transaction and speak, and

the results would be the same as if the chief himself had uttered the words.

² *Utilitatis causâ*, says Paul, *Sent.*, 5, 2, § 2. *Ratione utilitatis*, Imp. Severus and Antoninus, c. 7, 32, 1.

the actor himself, nevertheless, by the aid of fictions and interpretation, they were reflected upon the principal.



SECTION LVII.—WILL, CONSENT (*Consensus*); IGNORANCE (*Ignorantia*); ERROR (*Error*); COZENAGE (*Dolus bonus, Dolus malus*); VIOLENCE AND FEAR (*Vis, Metus*).

164. Legal acts necessarily imply the idea of intention, of the will. It is the spiritual element of the act, whereas the form is the material clothing of it,—its physical manifestation.

Certain acts take effect by the will of a single person; then there is only will (*voluntas*). Others require the concurrence, the agreement of two or of several wills; here there is consent, *consensus*, from *sentire cum*.

165. Hence, *ignorantia*, which consists in the complete want of knowledge of a thing (from *in* privative and *gnoscere*, to know). The want of knowledge has different effects, according as it relates to law (*ignorantia juris*), or to fact (*ignorantia facti*). The Digest devotes a title to the examination of these differences.¹

Also *error*, which consists in the false conception of a thing, and which can also relate to law or to fact.

Also *dolus*, which comprises every kind of cunning, every trick, that is to say, every intentional alteration whatsoever of truth in facts or in words, to lead another into error, to influence him in his will and in his acts. The Romans distinguished the *licit cozenage* (*dolus bonus*), used for the purpose of self-defence, and the *illicit cozenage* (*dolus malus*), committed with the purpose of injuring another. The latter is defined by Labeo: "*Omnis calliditas, fallacia, machinatio ad circumveniendum, decipiendum alterum, adhibita.*"²

And, lastly, violence (*vis*), which through the menace of injury, or through the commencement of the infliction of it, produces on the mind of the menaced person fear (*metus*), and thus acts as a means of constraint on his will.

¹ Dig. 22, 6, *De juris et facti ignorantia*.

² Dig. 4, 3, 1, § 2, f. Ulp.

166. The maxim of the *jus civile* with respect to legal acts was, that in spite of error, cozenage or violence, if consent had been given, if the legal act had been accomplished in its solemnities and in its words, its effect was produced; the right was created, modified or extinguished in conformity with the act that had been accomplished. But the *jus gentium* did not share in that principle; prætorian law condemned the iniquity of it, and by indirect means mitigated the otherwise inflexible severity of the materialistic *jus civile*.



§ III. ACTS OTHER THAN LEGAL ACTS.

SECTION LVIII.—THE CONCEPTION OF ACTS OTHER THAN LEGAL ACTS; THE PRINCIPLES WHICH REGULATED THEIR CONSEQUENCES IN LAW.

167. A multitude of events which have arisen or have come to pass in the world of sense, without being designed to create, modify or extinguish any right, have, nevertheless, consequences which often produce that effect, and which it is important to regulate.

All the events in which human agency takes no part are comprised in this category. Other events may happen in which human agency participates, but without any operation of the will; and others, again, through the will. Some are licit, the others illicit.

168. No one should enrich himself to the detriment of the rights of others.¹

“Every one is bound to repair the wrongs occasioned through his fault.”²

¹ “Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiorum.” Dig. 50, 17, 206, f. Pomp.; 12, 6, 14, f. Pomp. “Bono et æquo non convenit, aut lucrari aliquem cum damno alterius, aut damnum sentire per alterius lucrum.” Dig. 23, 3, 6, § 2, f. Pomp. “Nemo ex suo delicto meliorem suam conditionem facere potest.” Dig. 50, 17, *De reg. jur.*, 134, § 1, f. Ulp.

² “Non debet alteri per alterum iniqua conditio inferri.” Dig. 50, 17, 74, f. Papin. “Nemo potest mutare consilium suum in alterius injuriam.” Ib. 75, f. Pap. “Naturalis simul et civilis ratio suavit, alienam conditionem meliorem quidem (etiam) ignorantis et inviti nos facere posse, deteriore non posse.” Dig. 3, 5, *De negot. gest.*, 39, f. Gai.

Those two maxims, which the Roman jurists give as a formula on every occasion, and in so many different ways, and which Ulpian laconically sums up in these terms, *alterum non ledere, suum cuique tribuere*, are the sovereign rule by which most of the legal consequences from like events are regulated.

To these must be added a third rule, which appears also under various forms in jurisprudence, viz. that each individual, when not affected by either of the two preceding maxims, incurs the consequences, good or bad, of the things or rights belonging to him.¹



§ IV. ELEMENTS INSEPARABLE FROM ACTS.

SECTION LIX.—THE TIME (*Dies*); THE PLACE (*Locus*).

169. The conception of fact essentially and inseparably comprises two others: that of time, a fraction of eternity; and that of place, a fraction of immensity. The place which an act occupies in duration, that which it holds in space, each has its influence in the law.

170. Time is generally designated in the language of Roman law by the expression *dies*; for in most cases it is the day which is the legal measure of time.

The time in which the event has been accomplished, the relation of position anterior or posterior of one act with a certain other act; ²—the time of its duration; ³—time in connexion with the life of persons, from the birth to the death, which constitutes the various degrees of age;—the time from which rights begin to exist or to be exerciseable (*dies a quo*; *a die*; *ex die*), that in which they are to expire (*dies ad quem*; *ad diem*), which constitutes the term (called also in the Roman law *dies*);—the time within which the suit for the recovery of rights can or ought to take place;—time in the sense of negligence in that

¹ "Secundum naturam est, commoda cujusque rei eum sequi quem sequuntur incommoda." Dig. 50, 17, 10, f. Paul. "Injuriam quæ tibi facta est, penes te manere quam ad alium transferri æquius est." Dig. 46, 1, 67, f. Paul.

² For instance, the birth or the decease of persons, or to the right of inheritance.

³ For instance, for acquiring by prescription.

respect: all these are so many aspects under which the influence of time is brought to bear on rights.

With this, too, are connected the old distinction of days into *fasti* and *nefasti*, the system of calculating by working days, that is to say, reckoning only those during which no physical nor legal objection prevented people from acting; and the system of calculating by consecutive days, that is to say, by days in their successive course, without interruption (*tempus utile, dies utiles; tempus continuum, dies continui*); lastly, the various other methods of reckoning time, for the mode of calculation was not always the same in the different phases of law.

171. The place (*locus*) appears also, although with less importance than time, as an element of law: thus, for instance, the place of birth,—the place of the legal seat or domicile,—the place of the corporeal presence of persons,—the place of the situation of things,—the place where certain rights can be exercised or engagements accomplished,—the place where the process of suing for them is to be carried through.



§ V. AUTHENTICATION OF FACTS.

SECTION LX.—PROOFS (*De Probationibus*).

172. It is not sufficient that the acts should have been done in order that the law may be deduced from them: it is necessary that the existence of the fact should be authenticated; and in case of dispute or denial by interested parties, that the proof should be established.

The proof (*probatio*) always consists, without any exception, in an operation of the reason, in a logical deduction, which, from certain known facts, causes us to conclude the existence of the unknown. The declarations of witnesses (*testes*); the monuments (*monumenta*; from *monere*, to warn); the writings; the marks, signs or vestiges of all kinds; avowals (*confessio*); the oath (*jusjurandum*), are so many facts which may serve to

effect this purpose, with more or less certainty in the deduction, or, as they say, more or less conclusively.

173. To all these methods of proof, the expression *instrumenta*, in its most general acceptation, is applied in Roman law.¹ They are either public (*instrumenta publica*), or private (*privata*), or even domestic (*domestica*).

However, in a more restricted sense, *instrumenta* designates more especially the writings made to record the accomplishment of the act,—writings to which a multitude of other names are also given: those of *scripta*, *scriptura*, so called from the handwriting itself; those of *tabula*, *codex*, and its diminutive *codicilli*; *ceræ* (tablets covered with wax); *membranæ* (parchments) *chartæ* (papers), taken from the material which bears the writing; *chirographum* (from *χῆρ*, hand, and *γράφω*, write) for the writing emanating from the party to the suit;² *syngraphæ* (from *σύν*, ~~written~~, and *γράφω*, write) for the writings signed by various parties and delivered in different copies to each of them; *apocha*, a receipt (from *ἀπείχω*, to receive), and its corresponding expression, *antapocha* (from *ἀντί*, in exchange of, and *apocha*), a declaration that the receipt has been delivered;³ lastly, sometimes the very general name of *cautio* (from *cavere*, to take or give a security), because the writing, as supplying a means of proof, is a security.⁴

with

174. Often, when a legal act has been accomplished, or even when an event other than a legal event has happened, the parties interested introduce various elements of proof which will assist them in authenticating the existence of the fact which has generated certain rights. It is important not to confound, in the performance of legal acts, the formalities which thus in-

¹ *Instrumentorum nomine ea omnia accipienda sunt, quibus causa instrui potest.* Dig. 22, 4, *De fid. instr.*, 1, f. Paul.

² Dig. 2, 14, 47, § 1, f. Scævola; 22, 1, 41, § 2, f. Modest.

³ Cod. 4, 21, *De fide instr.*, 19, const. Justinian.

⁴ Dig. 2, 14, 2, § 1, f. Paul; 47, § 1,

f. Scævola; 22, 3, 25, § 4, f. Paul. We must take care not to give in Roman law to the word *cautio* the special sense which we give to it in French law. It is a very general expression, which applies to every security, to every guarantee given by one party to the other.

tervene for the sake of precaution, for the proof only (*ad probationem*), without their being necessary for the existence of the act (save and except the difficulty of proving the existence of it), with the essential solemnities, the performance of which is indispensable to the validity of the legal act, and without which that act would not take effect.

175. The question of determining on whom, in case of uncertainty or of denial of a fact, the burden of proof lies, is one of the most important, and often of the most delicate, in law. It is governed by this general principle, that it is for him who asserts that a fact has created, modified or extinguished some right, to prove the existence of that *fact*. For a fact is in reality nothing but a change in the state of the world of our perceptions. It is therefore for him who pretends that there has been a change, that something new has occurred, and consequently that the *status quo ante* of rights has been interfered with, to prove it; otherwise matters remain as they were.



SECTION LXI.—PRESUMPTIONS (*De Præsumptionibus*).

176. Presumption (*præ-sumere*, to take beforehand) is the adoption of a conclusion from certain facts known as hypothetical before the conclusion is positively proved or shown to be true. In an act of reasoning of this kind, it is evident that law cannot ground its conclusion on the basis of particular facts which have not yet happened; but it grounds it on general facts, or on those which generally occur or almost always occur. It is an act of reasoning from general to particulars, or induction.

177. In certain cases, law establishes that induction so firmly that it will not allow it to be affected by any individual fact. Such, for instance, as the maxim, *Res judicata pro veritate accipitur*¹—or the rule which expels from the family, as not belonging to the husband, the child born more than ten

¹ Dig. 50, 17, *De reg. jur.*, 207, f. Ulp.

months after the death of the latter.¹ There are also other cases.² It is this presumption which the commentators have called, in barbarous Latin which never belonged to Roman law, *Præsumptio juris et de jure*.

In other cases, where law makes its induction, it allows more or less latitude, that is to say, it permits the parties concerned to question the soundness of the induction on grounds peculiar to the particular fact, so as to show that the conclusion in the case in question is not correct.³ It is this presumption that the commentators have called, again on their own sole authority, *Præsumptio juris tantum*. It throws the burden of the proof on him against whom the presumption exists.

178. We can now see that presumption consists in a mental operation of the same kind as proof: it is always the conclusion drawn from known facts to an unknown fact. Only, in the presumption, the conclusion is adopted before actual and positive proof, and by way of induction from the general to the particular, independently of any examination of the details of those particular facts which are in question. We can also see how erroneous it would be, yielding to ideas conveyed by expressions commonly in use, to imagine presumption, in the language of law, as inferior to proof, and as having less force or less certainty than proof: it is indeed superior to it, and sometimes prevails against it.

179. Presumptions—that is to say, those conclusions or deductions which are drawn by a process of probable reasoning, as the result of experience, from something which is taken for granted—were not classified by the Roman jurists, nor were they treated differently from other forms of proof.

¹ Dig. 38, 16, *De suis et legit.*, 3, § 11, f. Ulp.

² For instance, Inst. 3, 21, and Cod. 4, 30, 14, const. Just., for the exception *non numeratæ pecuniæ*.

³ For instance, the various presumptions relative to filiation: "*Pater is est quem nuptiæ demonstrant*" (Dig. 2, 4, 5, f. Paul). "*Credendum est eum qui ex justis nuptiis septimo mense*

natus est, justum esse" (Dig. 1, 5, 12, f. Paul and 38, 16, 3, § 12, f. Ulp.). And for the case of the absence of the husband (Dig. 1, 6, 6, f. Ulp.); for the delivery of the title to the debtor (Dig. 2, 14, 2, § 1, f. Paul); for the title being erased (Dig. 22, 3, 24, f. Modest.); for the presumed intention of comprising his heirs in his acts (22, 3, 9, f. Cels.).

180. The whole of this subject, that is to say, all that has reference to the authentication of facts, has occupied the closest attention of jurists.¹



SECTION LXII.—DOUBTFUL FACTS (*De Rebus dubiis*).

181. Lastly, there are cases in which facts are surrounded with doubts difficult of solution.

Doubts may arise with regard to the intention or to the expressions, especially in cases where parties are not bound by precise formulas, and there is some uncertainty as to the interpretation.

They may also arise with regard to events. And sometimes the circumstances may render it necessary to settle the matter one way or another, however great the uncertainty. In such cases, the law itself may provide a solution; and this it will do, not so much because the solution it offers is probably the correct one, as because it is indispensably necessary that a solution should be found, and humanity or benevolence or expediency demands it.²

Roman jurists have exercised their ingenuity on a vast number of cases of this kind.³



§ VI. FICTIONS (*Fictiones Juris*).

SECTION LXIII.—FICTIONS OF THE CIVIL AND OF PRÆTORIAN LAW.

182. As law creates persons and things which do not otherwise exist, so it creates abstractions, or facts purely imaginary, and deduces from them rights just as if those facts really

¹ Dig. 22, 8, *De probationibus et presumptionibus*; 4, *De fide instrumentorum*; 5, *De testibus*; 42, 2, *De confessis*; 12, 2, *De iurejurando sive voluntario, sive necessario, sive judiciali*. And the corresponding titles in the Code of Justinian.

² Such are, with minor distinctions,

the cases of persons having relative rights dependent on the decease of one or the other, where they both die without its being possible to determine which of the two died first. Dig. 34, 5, 9, § 4, *Tryph.*; 16, *pr. f. Marcian*; 22, *f. Javol.*; 23, *f. Gai.*

³ Dig. 34, 5, *De rebus dubiis*.

existed. These are what the law calls fictions, and the Roman system of jurisprudence is full of them, some belonging to civil law itself,¹ but most of them purely imaginary conceptions of the prætorian law. And the commentators, outvying both, have set up hypothetical fictions, which had no existence in fact.²

183. The use of these fictions generally was to bridge over the interval between the harshness and severity of the *jus civile* and the more equitable and philosophical system of prætorian law, or to extend the operation of the civil law to cases which were beyond the reach of its provisions, or to cancel the operation of the law when its results were deemed to be too harsh. The inventive faculty was called in and facts were imagined and then acted on as if they really existed.

It was the prætor especially, whose efforts were incessantly directed to reconciling the requirements of civilization with the system of primitive law, who had resort to this expedient.³

184. In brief, and independently of this peculiar usage which forms a characteristic trait of Roman law, fictions, or the legal supposition of facts, are nothing but a laconic method of assigning certain qualities or properties to given situations; the law saying,—such are your rights, we assume certain facts.⁴

The domicile, or the legal dwellingplace of a person for the exercise or for the application of certain rights, is nothing else, especially in our legislation, than a fact of this nature; that is to say, a fact of pure legal creation.

¹ Such are those mentioned in a passage of the Institutes of Gaius, of which however there is a whole page of the MS. missing, leaving nothing but two paragraphs.

² Thus neither the *postliminium*, nor even the provisions of the *lex Cornelia*, which the commentators generally call *fictiones legis Corneliæ*, were ever mentioned as fictions in Roman law.

³ For instance, he at times assumed the necessary qualifications in the heir (Gai. 4, § 34), the *usucapio* complete (Gai. 4, § 36), or incomplete (Inst. 4, 6, § 5), the status of citizen or *peregrinus* (Gai. 4, § 37), a *dominatio capitis* as non-existing, whereas in fact it did exist (Gai. 4, § 38)—whence those actions styled *fictitiæ actiones*.

⁴ For instance, the *postliminium* and the *lex Cornelia*.

CONCLUSION OF THE FIRST PART.

SECTION LXIV.—CREATION OF RIGHTS.

185. We have thus all the elements indispensable to the creation of rights. We have the active and passive subject, in the persons; the object, in the things; the efficient cause, in the act.

To every situation, to any combination of those three elements, let us apply either the idea, the good and equitable (*jus, ars boni et aequi*), or the positive notion of what is ordained by law (*jus, lex, quod jussum est*), and we shall have, as consequences, immediate, and varying in each case according to the circumstances, rights (*jura*); that is to say, the conditions and advantages conferred by law.

186. Thus it is law (*jus*), taken in its first acceptation, according to the consciousness of what is good and equitable, or the authority of what is ordained, which, applied to the combination of those three elements, the persons, the things, the acts, gives, as a consequence, the rights (*jura*); taken in the second acceptation of the word, as effects, as results.

 PART II.

RIGHTS AND ACTIONS.

 ARTICLE FIRST.—RIGHTS.

CHAPTER I.

GENERAL CLASSIFICATION OF RIGHTS.

SECTION LXV.—PERSONAL RIGHTS; REAL RIGHTS (A CLASSIFICATION NOT ADOPTED IN THE ROMAN LAW).

187. Right is any faculty that a person has to do, to omit, or to exact something.

Roman jurisprudence did not recognize any general division of rights. That which is now commonly received, however, though not belonging to, was derived from Roman law.

Rights are divided into personal and real rights.

We accept this division, because it is exact, provided it is well defined.

SECTION LXVI.—IDEA OF PERSONAL AND OF REAL RIGHTS.

188. Leaving, for a moment, Roman traditions, if we confine ourselves to pure reason, the following notions appear to be forced upon us.

No right exists except from one person to another: every right has, therefore, necessarily one active subject, and one or more passive subjects; which, whether active or passive, can only be persons. In that respect, all rights are therefore personal.

Every right, besides the active and passive subject, has, moreover, and necessarily, an object, which, in its widest sense, is designated a thing. Every right has, therefore, a thing for its object; and, in that respect, every right is real.

Therefore, every right, without any exception, is at once personal as to its active as well as passive subject, and real as to its object.

189. But the mode in which persons as subject, active or passive, or things as object, can appear and act in the right, assumes two very distinct phases.

Every right, if we go to principles, is summed up in the faculty which the active subject has to exact something from the passive subject; now, the only thing which it is possible immediately to exact from a person is, that that person should do or abstain from doing something, that is to say, action or inaction. It is to this that every right is reduced. This necessity for the passive subject to do or to abstain from doing something is what is called, in legal language, an obligation. Every right, therefore, without exception, if we go to principles, consists in obligation.

190. But these obligations are of two sorts: the one general, which affects the community, and which consists in the necessity of leaving the active subject of a right alone, to let him derive the advantages to which his right entitles him, without let or hindrance. It is a general obligation to abstain from interference. This obligation exists in every case of right. No one has any business to interfere with another's enjoyment of a right. It may be said, that in every right there is always, on one side, the active subject, to which the right belongs, and, on the other side, the community at large, which is bound to abstain from interference and to allow him to whom the right belongs to act and enjoy it and to draw from it all the advantage he can.

191. But though this general obligation exists in the case of every right, there are some cases where it is the only obligation, that is, that the right confers on the active subject of it the faculty of deriving all the advantage he can from it directly, without any other obligation than that which exists in the community to abstain from interference.

There are cases, on the contrary, in which, besides this general obligation, the right confers on the active subject of it the faculty of making another person do some act, as to give, to supply, to do something; or to abstain from doing, or to suffer or to let a certain thing be done. In this case the passive subject of right is, so to speak, double; there is the community under an obligation to abstain from interference, and the individual under an obligation to do or to abstain from doing something. Either because this truth has not been clearly perceived, or because as it existed in the two cases of the community and the individual, men have not been at the pains to note the difference, we have adopted the habit of looking on the obligation as a single one, binding the whole community; and so the difference which exists between the two cases has been explained as follows.

In the former case, that of the community, there exists no person who is individually the passive subject of a right; so that in analyzing this right, only one person is to be found

(apart from the community in general bound to non-interference), and the thing which is the object of the right. This is the right which has been denominated "real."

In the latter case, there exists, besides, a person individually the passive subject of a right, that is to say, the man against whom the right is personally exercised. Here we have (again setting aside the community in general, bound to non-interference) a person the active subject, another person the passive subject, and, thirdly, a thing the object of the right. This is the right which has been called "personal."

192. To sum up, a personal right is that in which a person is individually the passive subject of it.

A real right is that in which no person is individually the passive subject of the right.

Or, in other terms:—

A personal right is that which gives the faculty of individually obliging another to do or to abstain from doing something.

A real right is that which gives the faculty of deriving advantage from a thing.

In both cases we may leave out of the question the community in general, bound to non-interference.

193. The definition thus given is wide: all rights, without any exception, in whatever manner they may be acquired, exercised or sued for at law,¹ and whatever may be the corporeal or incorporeal thing which is the object of them,² come under one category or the other.

It is not an arbitrary definition, but one which necessarily emanates from the nature of things; it is subject to no change, and reproduces itself inevitably in every legislation.

194. It is an error to imagine, however, that personal rights do not exist in a community, in relation to all men, as well as real rights. If another man owes me money, the thing is true,

¹ For example, both those who had an *actio* and those who were protected by an *exceptio*.

² As, for instance, the rights which

are connected with the condition of man, with his moral or corporeal individuality.

not only as regards the debtor, but as regards all other men. My right as a creditor has an existence, and is a part of my fortune as such in relation to other men: ¹ it will be protected, if necessary, should a third party attempt to deprive me of it.² But, besides the general community, my debtor is individually the passive subject of that right. In the case of real rights, on the contrary, no person, except the general community, is individually passive.



SECTION LXVII.—VARIOUS DENOMINATIONS OF REAL RIGHTS AND OF PERSONAL RIGHTS.

195. *Jus in re*, the expression for real rights, and *jus ad rem*, for personal rights, are barbarous expressions introduced in the middle ages, and which have never belonged to the language of Roman law.³ The former already appears in the *Brachylogus*, the summary of the law of Justinian, compiled in Lombardy in the twelfth century.⁴ Both are to be met with in the thirteenth century opposed to each other in the papal constitutions;⁵ and it is from the canon law that they seem to have passed

¹ To my own creditors, for instance, who may profit by it.

² Suppose a third party destroys my title as a creditor; suppose he prevents my debtor from fulfilling his obligations either by fraud or violence, or by possessing himself of the securities, contrives to get himself paid instead of me—let him in any way invade my right as a creditor, I shall have an action against him. It is the same as with real rights, only in the latter case the invasion by third parties is much more easily accomplished, and the modes in which that invasion may be attempted more numerous.

³ We sometimes find, in the fragments of the jurists in the Digest and in the Code of Justinian, the expressions *jus in re* or *jus in rem*, but indifferently applied, either for personal rights or for real rights. Thus they can be seen: Dig. 9, 4, 30, f. Gai.; 32 (3°), 20, f. Ulp.; 47, 8, 2, § 22, f. Ulp., where debts are in question as *fideicommissa*, deposit, *commodata*, or hiring. See

also Dig. 20 (1°), 71, § 5, f. Ulp.; Cod. 7, 39, 8, § 1, const. Just.

⁴ We find them with respect to real actions, "*cum in rem quam (adversarius) possidet, aliquod me jus dico habere.*" *Brachyl.*, lib. iv. tit. 19, in fin. And with relation to usufruct, "*Jus in re consequitur quis actione in rem proposita de usufructu.*" Lib. iv. tit. 23, § 8.

⁵ ". . . Quis eorum *jus habeat in præbenda.*" "*Habere jus decernimus in eadem.*" "*Jus vero quod secundo ad præbendam, non in præbenda . . . competebat.*" Sexti Decret., 3, 4, 40, Boniface VIII., 13th century. ". . . Vel aliorum quorumcumque beneficiorum in quibus *jus non esset quæsitum in re, licet ad rem.*" Sexti Decret., 3, 7, 8, Boniface VIII., 13th century. "*A jure, si quod in hujusmodi beneficio, vel ad ipsum forsitan competebat.*" Clementi. 2, 6, Clement V., 14th century. ". . . *Jus ad rem expectantibus dicta beneficia.*" Extravag. Johan. XXII., 4, 1, 14th century.

into secular jurisprudence. We must rid our judicial language of it.

The expressions *jus in rem* for real rights, and *jus in personam* for personal rights, framed after the model of some analogous expressions of Roman law, do not, any more than the preceding, belong really to it.¹

Absolute and relative rights. This is a philosophic division altogether foreign to Roman jurisprudence. It is certainly more rational than the last; but it is equally objectionable, because it seems to imply the idea that absolute right exists with regard to everybody, whilst the personal or relative right only exists with regard to persons the passive subjects of this right. Every right, from the moment it exists, exists with respect to all, and must be protected, if needs be, against all.² Only in the case of real rights no person whatever is individually the passive subject of them; whilst, in the case of personal rights, a person is individually the passive subject of them.

The common expressions, "real rights," "personal rights," have been accepted by general consent and use, and we adopt them as conventional phrases, though they do not completely express the idea, and are not altogether correct, because every right, without exception, is personal as to the subject to which it appertains and real as to the object.

¹ These are the actions which Roman jurists divided into actions *in rem* and actions *in personam*. So also in the case of exceptions and contracts. We shall see, when noticing these matters, and especially the system of formulas, how these expressions were correct and in harmony with formulary practice. But they must not be carried elsewhere.

² No one right is more absolute than another. The whole community is surety for every right, and is bound to abstain from interference with the exercise of it. The error chiefly arises from an idea that when a man institutes a suit against another in order to interfere with a real right (for example, a suit claiming property), he exercises that right. He exercises it when he uses the thing, when he enjoys the advantage of it, or when he disposes of it

in any way. There is never, in the exercise of a real right, any intermediate individual passive subject between me and the thing. This is the distinctive character of this right. But when I institute a real action against any possessor, I do not exercise my right; I defend it, I wish to have it recognized. It is as if a third party, whoever he might be, obtained possession of my title deeds, substituted himself for me, and wanted to receive payments in my stead. I should have the right to defend and to have my right recognized. In short, rights, both real and personal, exist with regard to all. The community is always the guarantor of all rights: but no person is individually a passive subject of the first; as to the second, a person is individually the passive subject of it.

But, in conclusion, we desire to point out that these expressions are both equally foreign to the law of the Romans, and that in this law no such general division was ever made, nor had it any place in their system.



CHAPTER II.

PERSONAL RIGHTS.



§ I. OBLIGATIONS.

SECTION LXVIII.—GENERAL IDEA OF THE OBLIGATION OR PERSONAL RIGHT.

196. In rights of this kind there is always a person who is the active subject, and another person who is individually the passive subject, of the right. The latter is, so to speak, in a relation of dependence with regard to the other. He is, in a manner, tied to the former for the execution of the right of which he is the passive subject. And so the terms used are all derived from the same figure of speech. *Obligare* (from *ob* and *ligare*, to tie); *obligatio*, *vinculum juris*; *adstringere* (to attach to); *contrahere* (to draw together), *contractus*,—are the words used to designate this right, or its effects, or certain modes of its operation. *Solvere* (to untie) and *solutio* are the terms used to signify its annihilation. Apart from all figure of speech, *obligatio* is nothing but the legal necessity, imposed on one person towards another, to make a payment.

It is a personal right in the passive point of view. In the active point of view, that is to say, considered in relation to the subject enjoying it, a personal right is the faculty of constraining a person to make a payment; in the passive point of view, that is to say, in relation to the subject who suffers from it, it is the necessity of making this payment.

Under the first point of view a personal right is called with us “debt;” among the Romans *nomen*, less generally *creditum*; and the active subject, to whom the right belongs, “creditor” (from *credere*, to have confidence, to give credit, which is not

always exact, for many debts arise involuntarily without there being any exercise of confidence from one person towards another). In the second point of view, a personal right is called *obligatio*, and the passive subject, against whom the right exists individually, debtor, *debitor*.

197. The immediate object of every obligation is always an act; it requires a person (taking the word "act" in its most general acceptation) to give, supply, or do something, or to abstain. The thing to be given or supplied is not the object of the obligation, except in a subordinate or ultimate sense: the coercion, the *juris vinculum*, is the primary object. This was realized by the Roman jurists, and is expressed by Paul in the following terms:—"Obligationum substantia non in eo consistit, ut aliquod corpus nostrum, aut servitutem nostram faciat; sed ut alium nobis adstringat ad dandum aliquid, vel faciendum, vel præstandum."¹

Dare, facere, præstare, were three symbolic words used in the formulas of Roman law to signify generally the possible object of all obligation. *Dare*, to transfer Roman property; *facere*, to accomplish a fact or even to suffer, to abstain; *præstare*, to supply, to provide an advantage of some kind or other. These two last terms have the widest signification: *facere* might, in its scope, include them all; and *præstare* also, since it embraces all kinds of advantages, corporeal things, rights positive or negative, acts, &c.; whence the general term "acts" (*prestation*).

198. With the idea of personal rights are connected—1st. The notion of the *obligatio*, properly so called among the Romans; 2nd. The rules regulating the formation, the transmission and the extinction of *obligationes*; and 3rd. The idea of certain personal rights which in Roman legislation and jurisprudence are not, properly speaking, *obligationes*.

¹ Dig. 44, 7, *De oblig. et action.*, 3, pr. f. Paul.



SECTION LXIX.—*Obligatio*, PROPERLY SO CALLED AMONGST THE ROMANS.

199. The obligation is defined in the Institutes of Justinian, "*Juris vinculum quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura.*"¹ This definition only applies to the *obligatio* under the *jus civile*. There was, in fact, the obligation, properly so called, of the Roman law, the civil obligation (*civilis obligatio*). The prætorian law, however, introduced *obligationes* which did not exist in civil law, and supplied prætorian means for putting them into execution; they were called prætorian or honorary obligations (*prætoriæ vel honorariæ obligationes*).

Finally, jurisprudence caused to be recognized, on the unique foundation of the rights of persons and of natural reason, certain obligations which were binding neither by the *jus civile* nor by prætorian law, and which were called natural obligations (*naturales obligationes*).

200. The principal effect of the *civilis obligatio* consisted in the necessity of the debtor making the payment to which he was bound, and consequently in the right which the creditor had to compel him by law to do so. That is what is meant when it is said that the *civilis obligatio* gave the creditor a *civil action* against the debtor. The prætorian obligation also produced an action, but only a prætorian action. As to the *naturalis obligatio*, it did not give the creditor the right to force the debtor by law to fulfil the object of the obligation. The necessity imposed on the debtor by the *naturalis obligatio* was less effective, and it was only occasionally, and by indirect means, that the creditor could put it in force. The *naturalis obligatio* had not, properly speaking, either civil or prætorian *obligatio*, there being no *juris vinculum quo necessitate adstringimur*.

¹ Instit. 3, 13, pr.



SECTION LXX.—CREATION OF OBLIGATIONS.

201. Every right is engendered by an act, consequently there can be no obligation which does not proceed from an act.

Reason teaches us that the acts which are capable of producing obligations can be reduced to the four following :—

1°. Consent of the parties ;

2°. Acts by which a person may wilfully have injured another, according to the maxim of natural reason that a man is bound to repair an injury wrongfully caused ;

3°. Acts by which, either voluntarily or involuntarily, a person may find himself enriched by the wealth of another, according to the maxim that no man has a right to derive an advantage from and to the prejudice of another ;

4°. Certain relations between persons in the constitution of the family or of society.

But the civil law of the Romans had a more restricted operation ; it recognized no obligation as a *vinculum juris* except in a few cases strictly prescribed by itself. It was only gradually, by the prætorian edict, by the science of jurisprudence, by imperial constitutions, and under the influence of the *jus gentium*, that these limits were extended.

202. With regard to those obligations which have their origin in the mutual consent of parties, the most general expression for them is that of “*conventio*,” or *pactum*, *conventum*, which signify the concurrence of one or more wills in the creation of some right, its modification or its extinction ; but the word *contractus*, which signifies the actual convention that produces obligation, is applied exclusively to conventions specially recognized as obligatory and which conferred an action by the ancient *jus civile*.

Roman law, in this creation of contracts, seems to have followed the historical gradation here set down.

203. First, the *nexum*, the ancient and generic title designating every operation accomplished by means of the bar of metal

and of the balance, "*Quodcumque per æs et libram geritur*,"¹ with the scale-bearer (*libripens*), the five citizen witnesses, the prescribed gestures and words. These ceremonial forms,—vestiges of the ancient times when, in the absence of money, metal was measured by weight,—retained their symbolic use and were employed for the creation, for the transmission and for the extinction of various kinds of rights; both of Quiritarian property and obligations. In order to create the obligation, the metal was supposed to be weighed and given by the creditor to the person he accepted for debtor; or else a thing was either really, or by fiction, alienated *ex jure Quiritium*, the solemn words uttered between the parties constituting the legal transfer,² by which the *vinculum juris* was established. The contracts of loan (*mutuum*), of guarantee (*pignus*), of deposit (*depositum*), were originally formed in this way. Afterwards the simple tradition of the thing sufficed to create the civil obligation, and thus contracts came to be recognized, which the Romans called contracts made, *re*.

204. The progress of Roman civil law, in the civil form of contracts, tended to simplify this solemnity *per æs et libram*; the symbolical weighing was taken as accomplished, and the bar of metal as weighed and given. Thence came the second Quiritarian form of entering into an obligation, the first derivation from the ancient *nexum*; the symbolic words were detached from the solemnity *per æs et libram*, which was held to be accomplished, and reduced to a solemn interrogation (*stipulatio*) and answer (*responsio*, *promissio*) between the parties. The Quiritarian terms prescribed for this interrogation and answer were SPONDES? SPONDIO, whence this ceremony came to be called *sponsio*. In course of time means were adopted to admit the *peregrini* to this form of entering into obligations, by using other kinds of interrogations: PROMITTIS? PROMITTO; DABIS? DABO, &c. And later still, the stereotyped features of the sys-

¹ "Nexum est, ut ait Gallus Ælius, quodcumque per æs et libram geritur, idque necti dicitur." Festus, on the word *Nexum*.

² Such are the terms of the XII

Tables. "Quum nexum faciet mancipiumque, uti lingua nuncupasset, ita jus esto." Festus, on the word *Nuncupata*.

tem disappeared, and Greek even came to be admitted into the stipulation; one of the parties might interrogate in Latin, the other answer in Greek, or *vice versâ*. As long as the interrogation and the response were in accord, whatever form the expressions took it was sufficient to establish the contract.¹

Such was the contract which the Romans called *verbis*. It was a very general form of entering into an obligation, in the sense that it could be applied to every kind of obligation which the contracting parties could create.

205. Afterwards came the third Quiritarian form of entering into obligations, the second derivation from the ancient *nexum*. This form, which was only applicable to obligations to pay a sum of money, consisted in considering the operation *per æs et libram* as accomplished, and consequently the sum, the object of the obligation, as weighed and given on the one hand, and as received on the other, and in writing it down in the established formulæ in the domestic register (*tabulæ* or *codex accepti et expensi*). Hence this contract came to be styled *expensilatio* (the writing down of the sum weighed and given); and the sum which formed the object of the contract was called *pecunia expensa lata*, or sum held as weighed and given, with regard to the creditor; *pecunia accepta relata*, or sum held as received, with regard to the debtor. And from this form of obligation came the generic expression *nomen*, as designating a debt, because the debt was inscribed on the domestic register in the *name* of the debtor. Hence also *nomen transcriptitium*, either because the entry was written first in a current waste book (*adversaria*), and then carried every month to the fair copy register, or rather because, by the act of committing to writing, a merger of the pre-existing credit was effected.

This contract was said to be formed *litteris*. Like stipulation, it was in theory exclusively confined to citizens. In the course of time, however, it was extended, but in a different

¹ Inst. 3, 15, 1. The stipulator was the interrogator, and consequently the one towards whom the promisor entered into obligation. Thence came the form of expression still in use with us,

to stipulate about a thing, or for one's benefit, meaning that one person makes another enter into obligations towards him.

form, to foreigners, in the shape of *syngraphæ* and *chirographæ*. After that the use of the *codex*, or domestic register, and with it the original contract *litteris*, fell into disuse. The *syngraphæ* of the *jus gentium* shared the same fate, and the *chirographum*, which survived the others, was itself considerably modified before the time of Justinian, at which period the latter was little more than mere evidence in writing of a contract.

206. Finally, the *jus civile* recognized four kinds of contracts only, as capable of being formed by consent alone, without the operation *per æs et libram*, without the solemn interrogation and entry in domestic registers, or any other formality: 1st, sale (*emptio-venditio*); 2nd, hiring (*locatio-conductio*); 3rd, partnership (*societas*); and 4th, mandate (*mandatum*). A fifth, the contract of *emphyteusis*, was added in the later times of the Lower Empire; but it is not reckoned in the same category as the others, because it was considered in Roman jurisprudence as a sale by some and a hiring by others. These contracts were called by the Romans *consensu*; they rested on the *jus gentium*, the form of entering into them being reduced to its simplest expression. They were characterized by this distinctive mark, that they produced obligations on both sides (*ultra citroque*), and that their effects were defined by equity (*ex æquo et bono*).

207. Hence, in the progressive development of Roman law, there arose four kinds of contracts—*re, verbis, litteris* and *consensu*. A contract made without any of these essentials was called *pactio, pactum, conventio*, and, under the *jus civile*, created no obligation. The imperial or prætorian law, however, did attach to some of them an obligatory force, and particular circumstances might also modify the application of the strict letter of the law, and impart to *pacta* certain legal effects.

208. With regard to acts which are not the result of mutual consent of the parties, the primitive civil law gave them the name of *noxa*, afterwards *maleficium, delictum*, and also provided an action in a great number of cases, in which the obli-

gation resulted from the prejudice wrongly done to another, and the prætorian law made a few additions.

209. Every obligation springs either *ex contractu* or *ex delicto*—" *Omnis enim obligatio vel ex contractu nascitur, vel ex delicto.*" Those obligations recognized by Roman jurisprudence, which had not a pure origin either *ex contractu* or *ex delicto*, but which nevertheless bore the characteristics of one or other of them (*variæ causarum figuræ*), were classified according to their resemblance under the head of *quasi ex contractu* or *quasi ex delicto*. Whence the general division of contracts into *ex contractu*, *quasi ex contractu*, *ex delicto*, *quasi ex delicto*.



SECTION LXXI.—TRANSFER OF OBLIGATIONS.

210. Roman law is logical. A personal right could not be transferred from one person to another. It is a bond between the active subject and the passive subject; and if you change one of these elements you have no longer the same right. There is not therefore, strictly speaking, a transfer of the credit from one to the other, but an analogous result is produced by means of procuration.



SECTION LXXII.—EXTINCTION OF OBLIGATIONS.

211. The cancelling of the bond of the obligation, and consequently the liberation of the debtor, however it may happen, is termed by the Romans *solutio* (an unfastening) in its most general acceptation.

212. The obligation, that is, the civil bond, could only be dissolved conformably to rules of civil law itself (*ipso jure*). In numerous cases, however, where the obligation, according to strict law, continued to exist, the prætorian law adopted circuitous means of furnishing the debtor with the power of defending himself against the demands of the creditor (*exceptionis ope*).

213. At the head of all legal methods for extinguishing obligations is that which accomplishes the end and object of the obligation, that is to say, the payment of what is due. The word *solutio*, taken in a more restricted sense, applies particularly to this mode of extinction.

214. But, besides this, civil law enabled a person to dissolve an obligation by replacing it with a new one contracted in its stead. That is what is termed a novation (*novatio*). All obligations whatsoever may be *novated*; but all the methods of entering into an obligation cannot be employed to effect this transformation. It must be accomplished either by the contract *verbis* or the contract *litteris*. Of these two the more convenient, the one the more commonly used, was the contract *verbis* or the stipulation.

215. If, by mutual consent, the parties wished to dissolve the obligation without payment or novation, so that the debtor might be set entirely free, in other words, if the creditor wished to remit the debt to the debtor, the Roman civil law required a symbolic act, which is well worthy of notice. It required a kind of imaginary payment (*imaginaria solutio*); and this fictitious payment might be accomplished either by the material and tangible forms, the scales, the witnesses, the established words and the bar of metal taken as weighed and given in payment by the debtor to the creditor (*solutio per æs et libram*),¹ or by the use only of the symbolic words, by the help of which the creditor, on the interrogation of the debtor, might declare the payment accomplished: "*Quod ego tibi promisi, Habesne acceptum? Habeo.*" This is what is called the *acceptilatio* (declaration that the thing is held as having been received), or *solutio verbis*; or by an inscription on the domestic register, in a formula stating that the sum due was considered as received (*solutio litteris*). Lastly, and as a last resort, in certain cases civil jurisprudence recognized the simple concurrence of the parties as sufficient to extinguish the obligation.

¹ Gai. 3, § 174.

So that we find the method of annulling obligations by means of a surrender by the creditor went through the same gradations as the mode of creating them. As they were contracted so they were dissolved, *per æs et libram, verbis, litteris, consensu*. But these methods of liberation by surrender by the creditor were confined respectively to the modes of creating the obligation, that is to say, the liberation *per æs et libram* answered to the obligations created *per æs et libram*; the *acceptilatio*, or liberation *verbis*, to obligations contracted *verbis*; the liberation *litteris* to those created by entry in the domestic register; and, lastly, liberation by mutual consent alone to those which mutual consent alone had made. But jurisprudence found the means of generalizing the use of the *acceptilatio* or *solutio verbis*, and made it a method of surrender applicable to all kinds of obligations by the aid of a preliminary novation, by which all obligations could be transformed into a verbal obligation.

Thus the verbal form of *stipulatio* came to be the means of making a *novatio* or of annulling an *obligatio*.



§ II. PERSONAL RIGHTS, OTHER THAN OBLIGATION PROPERLY SO CALLED.

SECTION LXXIII.

216. Under this title we rank certain personal rights existing in Roman law, in which, though there was a person individually the passive subject of the right, still there was no properly so-called obligation on the part of this person, in this sense, that this right does not confer on the active subject the faculty of taking the initiative and of attacking the passive subject in order to constrain him to give, to procure, or to do something; but only the faculty of refusing, of compelling him to withdraw his demand, if attacked by him.¹ It is a right of defence and not of attack. The obligation entitled by Roman law "*naturalis obligatio*," besides some other effects of which it was susceptible, was a right of this kind.

¹ It is a question of those personal rights which are only protected by exceptions.

CHAPTER III. REAL RIGHTS.

SECTION LXXIV.—IDEA COMMON TO ALL REAL RIGHTS.

217. In real rights, in addition to the general community, bound to abstain from interference, there exists but the person, the active subject, and the thing, the object of the right. Thus, there is no actual relation between two persons, no link nor tie uniting one to the other.¹ Thence arises a radical difference in the manner in which real rights and personal rights are exercised.

In the case of personal rights, he to whom the right belongs attacks the person who is individually the passive subject, to obtain from him the thing, the object of the right; in the case of a real right, there exists no intermediate passive subject; the right is therefore exercised immediately by the person, the active subject, on the thing which is the object of it. That is to say, that every real right necessarily gives to its possessor the faculty of disposing of the thing. It is precisely in the possible variety of the methods of thus disposing of it, that the variety of real rights consists.

218. The consideration of real rights involves the legal theories concerning *dominium* and *proprietas*, which import the most extensive powers of alienation: those upon *possessio*, which are intimately connected with *dominium*; those concerning real rights which are mere offshoots of *proprietas*; and, finally, those concerning rights which are not strictly offshoots or fractions of *proprietas*.

SECTION LXXV.—MANCIPIUM—DOMINIUM—PROPRIETAS.

219. The most perfect alienation, that which confers a real right, is, in the language of the text, *plenam in re potestatem*.²

¹ Thus some writers define real rights simply to be those which belong to us without any obligation from any one towards us. This is to define, not by

describing but by characterizing them as a something in which the notion of *obligatio* is wanting.

² Instit. 2, 4, § 4.

This comprises the right of taking: the use or the services of the thing (*usus*); the fruit, that is to say, the products which it is destined to give (*fructus*); the right of profiting by all which belongs to it; the right of modifying it, of parcelling it, of conferring to another real rights over it; finally, that of destroying and consuming it, which the Roman jurists called *abusus*, because it was a kind of using which causes the right to disappear.

220. *Mancipium, dominium, proprietas*, were the terms by which the right of possession was successively described by Roman jurists, and in these three words alone we can trace the progress of civilization and the development of law through each of the great epochs. *Mancipium*, the most ancient expression, belonged to the rude and primitive times of Roman law, when violence (*hasta, manu, capere*) was the ordinary mode of acquisition.¹ *Dominium* belonged to a later age: it indicates the social condition of the family. It was in each house (*domus*) that property was concentrated; though considered as belonging to the family in common, it belonged to the head of the family alone, no other could be proprietor; and all individualities were absorbed in his person. *Proprietas*, the latest term, belongs to the language of a more recent epoch, to that of the time of Neratius.² It was the age which we call the philosophical, the period marked by the invasion of the *jus gentium* on the *jus civile*, when the personality of the sons of the family was recognized; when not only the chief but the children too could be proprietors; when the right of property was an individual right; and accordingly we find it designated by a word which expresses its effects, *proprietas*, because it attaches the thing to each individual.

¹ Thus *mancipium* designates, in its literal acceptation, the judicial act of mancipation; by figure of speech, the right of possession produced by that

act, and sometimes the thing subjected to that right.

² *Dominium, id est proprietas*, says this jurist. Dig. 41, 1, *De adq. rer. dom.*, 13, f. Nerat.



SECTION LXXVI.—POSSESSIO.

221. The idea of possession consists of two elements—a physical, material act, the act of having a thing in our power, and an intention, that is to say, the will of having a certain thing in our power as proprietor, whether we are really so or not, whether we think we are or whether we know we are not.

Thus, in cases where there is only one of these elementary principles, the first and not the second, for example, in the case of a bailee, of a tenant, who, though having the thing materially in his power, has no intention of ownership, there is nothing but a physical detention, *nuda detentio*, *corporalis possessio*, *naturalis possessio*; the bailee, the hirer, being considered and considering themselves as mere detainers from another who, for the time being, is dispossessed, but who, in fact, holds mediately through them.

But from the moment that the two elements are united, there is real possession (*possessio civilis*). The predominating element is that of physical power over a thing, whence the name of *possessio*, synonym of power (from *posse*, to be able).¹ Civil law takes this thing into consideration and attaches to it important effects, whence *possessio civilis*.

222. It is a debatable question whether or not possession may be considered as a right. Roman jurists, according to the point of view from which they regarded it in one case, considered it as a mere question of fact; in the other, as a question of law.² In reality possession essentially consists in an act; but when we consider the effects and the protection of right attached to this act, we think it is correct to say that there is a right of possession.

223. Possession and property are two very distinct things.

¹ According to Labeo: "*A sedibus quasi positio: quia naturaliter tenetur ab eo qui ei insistit.*" (Dig. 41, 21, 1, pr. f. Paul.) We prefer the other derivation.

² "*Eam enim rem facti, non juris esse*" (Dig. 41, 2, 1, § 3, f. Paul). "*Possessio autem plurimum facti ha-*

bet" (Dig. 4, 6, 19, f. Papin.). See also, in the same sense: Dig. 41, 2, 1, § 4, f. Paul, and 29, f. Ulp.; Dig. 49, 15, 12, § 2, f. Tryphon. In a contrary sense: "*Cum . . . plurimum ex jure possessio mutuetur*" (Dig. 41, 2, 49, pr. f. Papin.). "*Possessio non tantum corporis, sed juris est*" (Ibid. § 1).

Generally they are united, and it is in the regular course of things they should be so. A man is a proprietor, and it is in the ordinary course of things that he should have the property in his power and at his disposal. But they may be separate; and whenever they are, there must be either error, ignorance, cozenage or misdemeanor,—something, in short, that is irregular.

It follows from this that possession, till proof given to the contrary, gives presumption of property; that it is the external indication of it; that it plays an important part, in Roman law especially, in the means of acquiring or losing property.

224. Here we come to the legal rules: 1st, on the acquisition of possession, in which we find occupation, which is the taking possession of a thing not yet belonging to any one, distinguished from tradition, which is the transference of possession from one person to another; 2nd, on the different effects of possession, considered either as an act or as a right, effects which vary according to different circumstances; and 3rd, on the cessation of the act, or the loss of the right of possession.

225. There is an important distinction which will throw much light on this subject, viz., that some of the advantages which appertain to *possessio* can, like those of *proprietas*, be parcelled out, separated and alienated in the same thing to different persons.



SECTION LXXVII.—DIFFERENT KINDS OF *Dominium*—SUCCESSIVE ALTERATIONS OF CIVIL LAW.

226. Under the primitive *jus civile*, there was one kind of *dominium*, the Roman, the *dominium ex jure Quiritium*; a man was a proprietor according to the *jus Quiritium* or not at all.¹ The citizen alone could enjoy this *dominium*; the things, the soil participating in the *commercium*, could alone be the object of it; the *modus operandi* recognized by the *jus civile*

¹ Gai. 2, § 40. We sometimes use the phrase Quiritarian *dominium*; the expression, though conveying the idea,

is not technical. They always said in Roman law, *Dominium ex jure Quiritium*.

could alone confer it. Foreign persons and soil were strictly excluded, and the occupants of soil which did not enjoy the *jus Italicum* had merely the *possessio*, and not the *proprietas*; nor could they acquire it by prescription.

227. At a later date, Roman jurisprudence lost its conservative Quiritarian exclusiveness, and, admitting the *jus gentium* as an active principle, recognized the form of *dominium*, which was expressed by the phrase *in bonis habere* (to have amongst one's property). This *dominium* is styled by Theophilus in his paraphrase *δεσπότης βονιτάριος*, whence the commentators have called it *dominium bonitarium*, a term altogether unknown to Roman jurisprudence. This *dominium* or proprietary right, this *possessio in bonis*, did not exist as a Quiritarian institution, but was suffered to exist side by side with the *dominium ex jure Quiritium*. The prætors recognized and protected it, jurisprudence developed its principles and rules, gave to it all the beneficial effects of its Quiritarian rival, and so equalized the two, that the difference ultimately became one of name rather than of fact.

228. By the time Justinian ascended the throne, *dominium ex jure Quiritium* had ceased to exist as a fact. As in the earliest period, so now, there was but one *dominium*, but this was the prætorian *dominium in bonis*. The emperor therefore abolished the only remnant of the Quiritarian—its name.



SECTION LXXVIII.—ACQUISITION—TRANSMISSION—LOSS OF ESTATE OR PROPERTY.

229. The method in which the estate was acquired, transmitted or lost is an important branch of legal study. As regards acquisition, it is necessary to notice the predominant principle of Roman law, which is, that the contracts between persons, even when clothed in the technical forms of the *jus civile*, were not sufficient to transfer the property from one person to another. Contracts had the effect of binding parties among themselves; they created a personal right, they could

even compel the transfer of property (*DARE*, in the language of Roman law), but they did not transfer it; they did not create the real right of property. To constitute *proprietas*, a definite act of quite a different nature was necessary, for example:—

1. Occupation, that is, taking possession of a thing which belongs as yet to no one, or else of a thing which belongs to the enemy, for conquest was the means, *par excellence*, of acquiring *dominium* according to Quiritarian law, and the lance was always the symbol of this *dominium*.

2. Tradition (*traditio*), that is to say, transfer of the *possessio*,¹ as long as it referred to a thing *nec Mancipi*, for applied to a thing *Mancipi*, tradition, under strict civil law, would produce no effect whatever of ownership; and under the intermediary law would place the thing simply *in bonis*:

Or else the solemn alienation under the *jus civile* called the *nexum*:² or,

The *mancipium*, later *mancipatio*, and accomplished by the symbolical form of the ancient sale, by means of the piece of brass and the scales (*per æs et libram*), with the scale-bearer (*libripens*), the citizen witnesses, the prescribed actions and words, *hunc ego hominem ex jure Quiritium meum esse aio, isque mihi emptus est hoc ære æneaque libra*, and even when it was not a question of a sale.³

3. *Usucapio*, acquisition by use, acquisition of Roman *proprietas* by possession for a certain period: one year for movables, two years for immovables.

4. The *in jure cessio*, another fiction, a symbol representing a judicial act in which the magistrate, *addicens*, uttered the *addictio*, and declared the thing the property, *ex jure Quiritium*, of the person to whom it was to be made over.

¹ It will be seen that the *jus civile* recognized two means of the *jus gentium*, occupation and tradition, as conferring the *dominium ex jure Quiritium*.

² The expression *nexum* is still more general than *mancipium* or *mancipatio*. It was applied to all phases whatsoever of the sale *per æs et libram*, and operated, as we have seen, to create as well as extinguish obliga-

tions. But the more especial signification of *nexum* came to be the engagement of a person or application of a thing, by means of the alienation *per æs et libram* to guarantee a debt.

³ Mancipation did not effect by itself the tradition, that is to say, the translation of the *possessio*. Vide Gains, 2, § 204; 4, § 131; Vat. J. R. Fragm. § 818.

5. The *adjudicatio*, by which the judge in a particular suit was authorized to adjudge the thing (*adjudicare*), that is to say, to transfer, by judgment, the *proprietas* from one person to another: this took place when it was necessary to determine the boundaries of adjoining estates (*finium regundorum*), or to divide an inheritance (*familiæ erciscundæ*), or to divide common property (*communi dividundo*).

6. The public sale of prisoners of war or of spoil, made in the name of the republic by the *quæstores ærarii*, under the symbol of conquest and of Roman *dominium sub hasta*,¹ or finally, some few other cases comprised by jurists under the general designation of *lex*, law.²

230. All these methods of acquiring *dominium ex jure Quiritium* relate to the acquisition of particular objects (*singularum rerum*). We shall speak in another place of the acquisition *per universitatem*.

231. Under Justinian the *mancipatio*, the *in jure cessio*, the distinction of things *mancipi* and *nec mancipi*, ceased to exist, and *traditio* applied with the same results to all corporeal things. But the principle, that contracts produce obligations—personal rights and not real rights—was preserved throughout.

232. To follow up the study of the subject it is necessary to trace the relations of the *proprietas* to the political constitution, the constitution of the family, the successive additions to the empire of different territories, and the social condition of the people at the different epochs in the history of Rome.

¹ Varro, *De re rust.*, 2, 10, *Si e præda sub corona emit*.

² See for the development of these different modes of acquiring property, Ortolan, *Explicat. Hist.*, vol. ii. book 2, article 1. The Romans desired that the acquisition of property should be manifested by a public act. At the point which our civilization has reached, when the economical conditions of society have undergone a revolution, when credit is so powerful an element in the production of wealth,

when personal rights form so large a portion of individual wealth, the necessity for this publicity is felt in personal as well as in real rights. And yet French legislation has retrograded; it has suppressed the public token in one case as well as in the other. The law of the 23rd March, 1855, *Sur la transcription en matière hypothécaire* was intended to remedy some of the greatest inconveniences that result to third parties from this system.

SECTION LXXIX.—REAL RIGHTS OTHER THAN *Proprietas*
AND *Possessio*.

233. Among these other real rights there were some which were, in the strict sense of the term, dismemberments, or fractions of the *proprietas*. In fact, they conferred on him who enjoyed them the power of alienation within certain limits. For example, the faculty of alienating a thing, in the sense of disposing of it, use of fruits or produce, or even parts of it; the servitudes (*servitutes*) both prædial (*rerum, prædiorum*) and personal (*personarum, personales*), and especially, among the latter, the usufruct (*usufructus*) and the use (*usus*); the *emphyteusis* and the right of superficies,—are among these real rights.

The Roman jurists have failed to point out to what extent real rights attach to the position of hirer or bailee with the right of user (*commodatum*), and have confined their attention respecting them to the consideration of the personal rights they create as contracts.

234. There were also other real rights, the conferring of which was not considered as diminishing the *dominium* of the grantor; such are pledge (*pignus*), where the delivery of the pledge temporally changes the right of possession,¹ and hypothecation (*hypotheca*): to which is attached this peculiarity, that this species of real right might be created by mere consent.²

¹ The guaranteed creditor had the *possessio ad interdicta*, Dig. 41, 3, 16, f. Javol.; 41, 2, 36, f. Jul.

² This final observation may be

added: there are real rights, as we have already seen in the case of personal rights, which are only guaranteed by exceptions and not by actions.



CHAPTER IV.

CONSIDERATIONS APPLICABLE TO PERSONAL RIGHTS AND TO
REAL RIGHTS.

SECTION LXXX.—RIGHTS RELATING TO THE STATE, TO THE FAMILY, TO THE MORAL OR PHYSICAL INDIVIDUALITY OF MAN.

235. Man considered from this point of view is susceptible of both real and personal rights.

On the one hand, the relations resulting from the status of an individual, and the necessary elements of such status, particularly *familia*, give rise to numerous obligations.

And on the other hand, we find therein a union of real rights, whose object is not corporeal things, but immaterial abstractions, and which are nearly all of the highest value to man. Thus, the character of father, of son, of free, of enfranchised, of patron, of citizen; the liberty and individual safety of the physical person, the honour, the reputation and the whole of the intellectual faculties of the moral person, all these form the object of so many rights, which belong to us directly and immediately, and that without the intervention of an individually passive subject, and independently of all obligations towards us. These are real rights.

SECTION LXXXI.—ACQUISITIONS OR SUCCESSIONS
per Universitatem—INHERITANCE.

236. There are means of acquisition which apply both to real rights and personal rights.

The *persona* of an individual who is deceased (and sometimes even before decease) is detached as it were from that individual and implanted in another, who continues the existence of the *persona*, and through him are transmitted all real and personal rights, with the exception of those whose nature it is to die out with the individual.

237. This substitution of one *persona* for another was not a matter of the mere volition of the parties. The State, either by

the general law common to all, or by a special law passed in the *comitia*, or else by the magistrate, always intervened, at least until the necessity for the intervention was done away with, by means of fictions and other indirect methods of evading the strictness of the ancient *régime*, changes which were brought about as the *jus privatum* grew up and overshadowed the *jus publicum*.

238. *Hæreditas*, whether *ex testamento* or *ab intestato*, *bonorum possessiones*, *fideicommissaria hæreditas*, *legatum*, legacies in certain cases, and especially at the time of Justinian ; *adrogatio* and some other legal conditions, rights, actions and events which Justinian for the most part suppressed,—were so many methods of succeeding to the goods and rights of a person when dead, or even during his lifetime.

ARTICLE SECOND. OF ACTIONS.

§ I. *PRELIMINARY NOTIONS.*

SECTION LXXXII.—RIGHTS—JURISDICTION—PROCEDURE.

239. Rights are engendered and their effects defined ; but rights are abstract, they are purely creations of the social world, they are immaterial, they are in themselves inert and powerless : to give them life and action there must be power and procedure. And what this power and procedure are, are questions that arise in connection with every form of society, and every species of right.

240. The law, the jurisdiction and the procedure are the necessary components of every legislative system. The last two are equally worthy of study with the first, for in them we realize the living and active principle. The study of the law familiarizes

us with the abstract; a visit to a court of justice places the living citizen before us and exhibits the reality of law.



SECTION LXXXIII.—GENERAL IDEA OF THE ACTIO.

241. The word action (*actio*, from *agere*, to act) in its etymological signification designates the putting into action of the law, or the act or series of acts by which we have recourse to judicial power to enforce a right, either in defending ourselves or in attacking another. By figure of speech, *action* signifies, in a second sense, the right itself of exercising this recourse to authority; and, in a third sense, the prescribed means of exercising it.

242. But to assign to this word any one distinct technical meaning would be in effect to confound the various systems of judicial and legal procedure which succeeded one another in the history and constitution of Rome. For the technical meaning of the word *actio* has changed with each of these systems.



SECTION LXXXIV.—THREE EPOCHS AND THREE SYSTEMS OF JUDICIAL PROCEDURE IN ROMAN LAW.

243. These systems were three in number :—

1. That of the *legis actiones*.
2. That of *formulae* or *ordinaria judicia*.
3. That of *extraordinaria judicia*.

244. The first extended, if not in fact, at least in theory, from the foundation of Rome till the *lex Æbutia*, B.C. 177, or B.C. 171. This period may be termed the Quiritarian era; its peculiarities have been already impressed upon the reader.

245. The second form, the *ordinaria judicia* or *formula* system, was in vogue from the decline of its predecessor till the

time of Diocletian, A.D. 294. This period is characterized by the philosophic development of jurisprudence as the science of justice and equity.

246. The *extraordinaria judicia*, which commenced with Diocletian, mark the period when *res publica* had lost its original signification, and when the imperial will had become the source and fountain of all legislation and administration.

Concerning each of these periods the student of Roman law should keep prominently in his mind the answer to the two questions: What is the governing principle? What is the form of procedure?



SECTION LXXXV.—DISTINCTION BETWEEN JUS AND JUDICIUM,
MAGISTRATUS AND JUDEX.

247. The distinction is a most important one, and strikes at the root of the system. *Jus* is the right, the law, or will: *judicium* the tribunal, or proceeding where or by which the right is contested and declared.

248. *Jurisdictio* is the function of declaring the law, and of conferring the public power (*imperium*) upon the person charged with its execution. This power was lodged in the hand of the magistrate, who might also assume the functions of *judez*.

249. The two functions were perfectly distinct, and were usually entrusted to different hands, the *magistratus* and the *judez*. By a figure of speech, to be *in jure* was to be before the magistrate charged to speak the law; to be *in judicio* was to be before the judge charged to examine the merits of the case.¹

To the magistrate belonged the functions expressed by the words *edicere*, *jus dicere*; to the judge those expressed by the word *judicare*. So, also, the *jurisdictio* of the magistrate

¹ In certain texts *judicium* is substituted for *jus*, but it is an inaccuracy.

which declared the law, answered to the *sententia* of the judge which settled the debate between the litigants.

The *addicere* of the magistrate, to assign the property to any one in the name of the law, answered to the *adjudicare* of the judge, and hence also *addictio*, answering to *adjudicatio*.¹

250. This distinction between *jus* and *judicium* seems to correspond, in some respects, with our modern idea of the distinction between a question to be decided on fact, and on law.

However, it would be an error to look upon the office of judge as limited to the decision of a simple question of fact. He had, it is true, to ascertain the facts, but he had, in addition, to determine their legal bearing. His function was therefore mixed, the extent of the judicial element depending upon the nature of the powers conferred upon him for the given occasion.²

251. We thus trace the progress of the separation between the *jus* and *judicium* under the three systems.

Under the first system, the distinction existed;³ but was not always observed.

Under the second, the separation was complete: and the magistrate only in extraordinary cases himself acted as judge.

Under the third system, the extraordinary became the ordinary and the two functions were united.



SECTION LXXXVI.—THE STATE APPOINTS THE MAGISTRATE, THE PARTIES THE JUDex.

252. The functionary who had the *jurisdictio*, that is, the magistrate, was clothed with state power, which he exercised

¹ The prætor, in declaring the law, assigns (*addicit*) not only property, but other things as well, for example: a judge to litigants; the right of freedom, sonship, &c.; whilst the *adjudicatio* of the judge is never applied to anything but property or some servitude.

² Amongst ourselves, in criminal matters, it is not correct to say that the jury has only to resolve a question

of fact; for even the question of culpability is one of the most delicate of penal law.

³ Thus in the law of the Twelve Tables: *Si in jus vocat atque eat*. (Cic., *De legib.*, 2, 4; 3, 75; Aul. Gell. 20, 1.) Thus the action of the law, *judicis postulatio*, which had for its special object to obtain from the magistrate a judge for the suit.

during the whole period of office, but the judge was a simple citizen appointed to each particular case to decide the matter at issue. The authority which the magistrate exercised was the public power, *imperium*; the matters confided to the judge were private.

253. Nevertheless, as he had to fulfil a public office he was selected from the class of citizens qualified under the constitution to exercise that function, and his powers were imparted to him by the magistrate.

One characteristic of this institution is the fact, that, be the nature of the proceeding what it might, no judge could be forced upon the parties without their consent.¹

The parties agreed between them in the choice of their judge, which was called *judicem sumere*.

If he was proposed by the magistrate to them, they either agreed to, or excepted to him, without having to give any reason, which was called *judicem ejerare* or *ejurare*, *rejicere*, *recusare*; if they could not agree, it was decided by lot.²

And the judge thus fixed upon was appointed by the magistrate to hear the suit, which was called *judicem addicere*.³ It was a public duty which he could not refuse.⁴

254. There was for each jurisdiction only one magistrate, and for each suit, as a general rule, only one judge (*unus judex*); but in either case assistance might be rendered by assessors, or by jurists for the purpose of consultation.



SECTION LXXXVII.—THE PUBLIC ADMINISTRATION OF JUSTICE.

255. This principle of the public administration of justice is coeval with the very foundation of Rome, and survived throughout the three systems of procedure.

¹ "Neminem voluerunt majores nostri, non modo de existimatione cujusquam, sed ne pecuniaria quidem de re minima esse judicem, nisi qui inter adversarios convenisset." (Cicer., *Pro Cluent.*, 43.)

² Cicer., *Pro Flacco*, 21; *In Ver-*

rem, 2, 12; 3, §§ 8, 11, 13 et 41. Plin., *Hist. natur. proæm.* Dig. 10, 2, 47, f. Pomp.

³ Dig. 5, 1, 39, f. Papin.; 46, f. Paul, 80, f. Pomp.

⁴ Dig. 50, 5, 13, § 2, f. Ulp.; 5, 1, 78, f. Paul.

It was in the forum, in view of all the people, that the magistrate seated on his *tribunal* exercised his jurisdiction. It was also in the forum, under the eyes of every one, that the judge on his *subsellium* proceeded to the examination, and to the decision of the suit (*judicium*); to him the evidence was submitted, before him the witnesses were examined, and the patrons or the advocates pleaded.

The magistrate had the power, in case of necessity, of holding his court, called *tribunal ponere*,¹ elsewhere than in the forum.

And the judge might try the case in any other place pointed out by the magistrate who appointed him,² or he might hear the suit in the place where the cause of action arose, but it must be in public.

In later times *prætoriums* were constructed, which were buildings for the administration of justice; but the principle of publicity was observed in their arrangement.

The only interference with this was the practice which prevailed of drawing a curtain (*velum*) before the magistrate while he deliberated with the assessors or counsel in the *secretum*, or semicircular seat.



§ II. *LEGIS ACTIONES*.

SECTION LXXXVIII.—THE FUNCTIONS OF THE MAGISTRATE AND THE JUDEX UNDER THIS SYSTEM.

256. The functionaries connected with the system of the *legis actiones* were as magistrates—at Rome, at first, the kings, then the consuls, then the prætor, and, for a certain class of cases, the ædiles;—in the *municipia* the decemvirs (consuls on a small scale)—in the provinces (which only began to be part of the empire towards the end of the epoch of the *legis actiones*), the proprætors or proconsuls.—As judges, the *judex*, appointed for each case, and only eligible from the order of the senators; the *recuperatores*, for which the choice was less restricted, and who were always several in number

¹ Livy, 23, 32.

² Dig. 5, 1, 59, f. Ulp. See also 4, 8, 21, § 10, and following, f. Ulp.

(either three or five) for each suit,¹ whilst the judge was generally alone (*unus judex*); lastly, the centumvirs, elected annually by the *comitia* of each tribe, organized into a kind of permanent college, and charged with judicial functions—an eminently Quiritarian tribunal, in front of which a lance (*hasta*) was planted as a sign of its character and duties,² and which was divided into several sections.

In certain cases, under the *legis actiones* it was the magistrate himself who adjudicated, in others the case was sent before a judge; but what the principle was by which a case was sent to a *judex*, or before *recuperatores*, or before the college of the centumvirs, is uncertain. The principle of the *recuperatores*, although they were introduced under the system of the *legis actiones*, was nevertheless foreign to it; for the *recuperatores*, in reality, had no connection with cases in which there were no foreigners or aliens concerned: it was an institution belonging to the *jus gentium*.



SECTION LXXXIX.—FORMS OF PROCEDURE, OR ACTIONS OF THE LAW (*Legis Actiones*).

257. There were five *legis actiones*. Three were forms of procedure to obtain a decision in the suit. Two were more particularly adapted to carry into execution the sentence.

258. Of the three first, the *actio sacramenti* was the most ancient, which applied with variations of form to suits either for obligations, or for right of ownership: but the same character was common to all cases, viz., the *sacramentum*, or sum of money which each litigant was obliged to leave in the hands of the pontiff, and which was lost to the defeated party and devoted to purposes of public worship (*ad sacra publica*).³ This is the action with which we are most acquainted. The *judicis postulatio* was the demand made to the magistrate for the appointment of a judge, and which appears to have taken place,

¹ Tit. Liv. 26, 48; 43, 2; Cicer., *In Verr.*, 3, 13; Gai. 1, § 20.

² Gaius, 4, § 13, and following.

³ Festus, on the word *Sacramentum*.

whatever might be the nature of the claim. Finally, the *condictio*, a much more recent *legis actio*, and one purely confined to the prosecution of obligations.

259. The two of the last kind were the *manus injectio*, or bodily seizure of the person of the debtor condemned, or convicted on his own admission, which constituted him *addictus*; and the *pignoris capio*, or seizure of the goods of the debtor.¹

The *legis actio* called *per manus injectionem*, though more particularly a means of execution, was also sometimes employed as a method of entering into certain suits which the magistrate decided by his own authority.

260. These *legis actiones*, except the last,² were accomplished *in jure*, before the magistrate, even in the cases where it was necessary for him to appoint a judge or recuperators, or to send the matter to the college of centumvirs. They were the formulæ or judicial preliminaries.

261. The characteristics of the *legis actiones* were materialism and superstition: they were attended by wild gesticulation and a close adherence to technicalities which breathed throughout the spirit of patrician supremacy, Quiritarian power, and subjection to the repressive influence of sacerdotal authority.³

SECTION XC.—SIGNIFICATION OF THE WORD *ACTIO* UNDER THE *LEGIS ACTIONES*.

262. Thus we see that under the system of the *legis actiones* the word *actio* designated neither the prosecution of each right in particular, nor the power of instituting such prosecution: there was no separate *actio* for each right.

Gaius⁴ says the *legis actiones* were so called either because

¹ On all these *legis actiones*, see specially Gaius, 4, § 11, *et seq.* Unfortunately there is an omission here of two pages.

² Gaius, 4, § 29.

³ Gaius, 4, §§ 11 and 30; 4, § 28.

⁴ Gaius, 4, § 11.

they were of legal and not of prætorian origin ; or because they derived their names from the legal terms (*legum verbis accommodata*) to which they rigorously adhered.



SECTION XCI.—FICTITIOUS APPLICATION OF THE *Legis Actiones* TO CASES WHERE THERE WAS NO REAL SUIT (*in Jure Cessio*).

263. It not unfrequently happened that, in order to transfer a thing or a real right, the judgment of a magistrate became necessary or advisable. In such cases the party to whom the transfer was to be made brought a collusive action against the other, who, not disputing the claim of the plaintiff when summoned *in judicio*, the magistrate adjudged (*addicebat*) in favour of the claim.

264. This was called *in jure cessio*, and by it the transfer of the *proprietas* in things corporeal and incorporeal, the transfer of tutorship, the enfranchisement of slaves (*manumissio*), of children, the *adoptio* of sons by means of feigned *mancipatio*, were effected. Hence, the occasional application of the term *legis actiones* to these acts, *Idque legis actio vocatur*.¹



SECTION XCII.—DECLINE OF THE *Legis Actiones*.

265. We have pointed out how these *legis actiones* underwent the vicissitudes through which all Roman legislation passed, and even in the sixth century of the city we find, as Gaius declares, that they had become the object of popular hatred.² They were first of all abandoned by common use when the legal forms, designed originally for aliens, came to be used by citizens ; they were formally abolished by the *lex Æbutia* and the two *leges Juliae*, one of which is attributed to Julius Cæsar, B.C. 46,

¹ Gai. 2, § 24; Dig. 1, 20, *Off. jur.*, 1, f. Ulp.; 1, 7, *De adopt.*, 4, f. Modest.; 1, 16, *Offic. procons.*, 3, f. Ulp. Paul, *Sent.*, 2, 25, § 4. Cod. Theod. 4, 10,

De his qui non a dom. man., 1. Cod. Justin. 8, 48, *De adopt.*, 1.

² Gai. 4, § 30.

the other, or perhaps even both, to Augustus, B.C. 25 ; and they were never again used except in two instances, one of which was the case where the suit should come before the college of the centumvirs. Finally, in later times, they were limited to the *in jure cessio*.



§ III. FORMULÆ OR ORDINARIA JUDICIA.

SECTION XCIII.—THE MAGISTRATE AND THE JUDGE UNDER THE FORMULA SYSTEM.

266. The public functions were exercised during the formulary period by magistrates who were,—at Rome, the prætors, the number of which had been successively augmented till it reached eighteen, the ædiles, the præfect of the city, and the prætorian præfects;—in the provinces, the governor of each province, under the several titles of proconsuls, proprætors, lieutenants (*Cæsaris legati*), presidents (*presides*) or præfects, who repaired at certain periods to the principal towns of their provinces to hold assizes (*conventus*); and above them all, constituting the last court of appeal, was the Emperor.

As judges there were the *judex* or *arbiter* named for each cause, the recuperators, and the college of the centumvirs, which survived, though in decay, to the end of the formulary period.

267. A radical change, which among many others was in itself alone the sign of a complete social revolution, was the extension among citizens of the eligibility of being appointed judges. The privilege had originally belonged exclusively to the senators, but came, after a prolonged dispute that lasted upwards of half a century, to be shared between the senators and the knights, and was subsequently extended to other citizens. Five *decuriæ*, or lists of citizens nominated for the office, were every year drawn up by the prætor, and suspended in the forum (*judices selecti*), and publicly posted (*in albo*; *judices in albo relati*).¹

¹ Senec., *De benef.*, 3, 7; Cic., *Pro Cluent.*, 43.

The first *decuria* was composed of senators, the second of knights, the third of soldiers, the fourth and fifth (added one by Augustus, the other by Caligula) of citizens.¹

From these lists the judges were selected for each case.

The monopoly of the patrician order in the administration of justice was thus broken up, and the citizen was, as we should say in modern times, judged by his peers. Similar lists were prepared in the provinces by the governor.

268. The functions of the magistrate were limited to his especial jurisdiction, as those of the judge were to the particular case. But the practice of obtaining the assistance of able lawyers as assessors became very general during this period.



SECTION XCIV.—THE FORMULÆ.

269. The symbols, with the consecrated terms and gestures of the primitive times, had disappeared, and were replaced, during this period of the formulary system, by the science of law. The magistrates charged with the organization of the *judicium*, after the argument before him *in jure*, delivered to the parties a *formula*, which became the rule of the case.

By this formula, the elements of which were doubtless suggested by the parties concerned, the magistrate invested the judge with his authority;—he first announced the question in dispute, and the fact alleged by the plaintiff as the basis of his claim;—then, and here begins the vital portion of the formula, he defined the plaintiff's claim, of which the magistrate required the verification: in certain cases he also stated the grounds of defence, and the answers which it would be incumbent on the plaintiff to give to make good his case; then followed the order to condemn or acquit the defendant, according to the nature of the proof adduced, in some cases indicating exactly the sentence that was to be pronounced, in others allowing more or less latitude to the judge, and in particular cases adding to the

¹ Suet., *Octav.*, 32; *Caligula*, 16; *Galba*, 14.

power of condemning or acquitting, that of adjudging, that is to say, of vesting the *proprietas* in the given thing in either party by his judicial sentence.

270. It was necessary that the judge should be simply a citizen, deriving all his authority from the magistrate, and exercising no functions except by virtue of his formula.

The preparation of the formula was, therefore, of the greatest moment in this form of procedure, and the full force of legal science was brought to bear upon it; the most renowned jurists were consulted alike by the litigants and the magistrates. The power of logical analysis and connection, the accuracy of expression, and the way in which every right and every shadow of right is provided for in this legal instrument, is wonderful. They were prepared beforehand, inscribed on the album, and exposed to the public inspection.¹ The plaintiff went before the magistrate *in jure*, indicated the formula he required; its clauses were then discussed by the parties; the formula was adapted to the particular case, and finally delivered by the prætor (*postulatio, impetratio formulæ, vel actionis, vel judicii*).²

271. The study of the parts of which the formulæ were composed, and of their various conceptions, is the key to this system. At the head we always find the institution or appointment of the judge, "*Judex esto.*"

In addition to this, the formula contained four chief parts (*partes*).

1st. The announcement in general terms of the object of the suit, and the facts alleged by the plaintiff as the basis of his claim, and which to a certain extent set forth the nature of the case, for example: "*Quod Aulus Agerius Numerio Negidio hominem vendidit;*" this was therefore called the *demonstratio*.

This, however, was not necessarily inserted, because as it was rather by way of preamble it might be sufficiently contained in the second part.

2nd. The second part was the definite and accurately stated

¹ Gai. 4, § 47; Cic., *Pro Rosc.*, 8. 3; *De invent.*, 19; *In Verr.*, 4, 66;

² Cic., *Part. orat.*, 28; *Pro Cæcia.*, Asconius, *In Verr.*, 8.

case of the plaintiff which must be verified by the judge, and which consequently involved the question of legal right—*juri contentio* according to the expression of Gaius: "*Si paret*," &c. "If it appears that." This part was called the *intentio*, from *in* and *tendere*, whence we have the words *intention* and *pretension*.

This was the vital part of the formula and could in no case be dispensed with.

3rd. The third part was that which gave the judge the order to condemn or to acquit according to the weight of the evidence brought before him, and fixed with more or less latitude the judgment that he had to pronounce: "*Condemnato; si non paret, absolvito*." This portion is termed the *condemnatio*.

4th. The fourth part, which only appears in three formulæ, was styled the *adjudicatio*, by which the magistrate conferred upon the judge, in addition to his power of finding for the plaintiff or the defendant, the right to ascribe to or vest in either party, according as he should find for the plaintiff or the defendant, the property in the thing which is the object of the suit: "*Quantum adjudicari oportet, judex Titio adjudicato*."

272. Every *condemnatio* in the formula system was pecuniary: whatever was the nature of the suit the judge had only the power to condemn either party to pay a given sum of money; this is an important and characteristic feature of the system which must not be lost sight of. The methods resorted to, for the purpose of avoiding the effects of this principle, especially in cases where the object of the action or suit was to determine some real right, are most ingenious and worthy of attention.¹

273. In addition to these four principal parts, the formula might also contain certain accessory parts which were termed *adjectiones*.

¹ See Gai. 4, § 32 et seq.

SECTION XCV.—SIGNIFICATION OF THE TERM *Actio* UNDER THE FORMULA SYSTEM.

274. The word *actio* here signifies the right conferred by the magistrate upon the plaintiff to enforce a claim before a judge; it is thus expressed by Celsus: “*Nihil aliud est actio, quam jus quod sibi debeatur iudicio* (before a judge) *persequendi*.”¹

The word *actio* also designated the formula which was delivered to the litigant, and by which this right was conferred upon him.

And frequently, by a figure of speech in which the effect is taken for the cause, the term *iudicium* was applied to the formula and consequently to the action, that is, to the act instituting the suit.

In this way the three terms *actio*, *formula*, and *iudicium*, are frequently in connection with the formula system used as synonymous, and as a result gave rise to expressions like the following: *actionem, formulam*; or *iudicium postulare, impetrare, accipere, suscipere, dare, accommodare, denegare*; “*actionem, iudicium dabo; non dabo*.”



SECTION XCVI.—ACTIONS IN REM AND IN PERSONAM.

275. Actions are divided in Roman jurisprudence into various distinct categories; a great number of these distinctions flowing from the conception of the formula. The *intentio* is that which chiefly influences and determines the nature of the action.

276. The principal division erected upon this basis is that into real and personal actions, or actions *in personam* and actions *in rem*.

The *intentio*, inasmuch as it sets forth the claim of the plaintiff, must necessarily contain all the essential elements indicating his legal rights.

¹ Dig. 44, 7, *De oblig. et act.*, 51, f. Cels.

If it is a question of an obligation, the component elements, in addition to the active subject of the right, are the person, individually the passive subject; and the thing which is the object of the right. The *intentio* must therefore set forth these three. The person of the obligee appears in it as a passive subject: "*Si paret Numerium Negidium Aulo Agerio dare, facere, præstare, oportere.*" Hence it is said that the *intentio*, or the formula, the action (the part being taken for the whole), is *in personam*.

When, however, it is a question of real right there is no individual passive subject; the component elements of the right are, a person the active subject, and a thing which is the object of the right. The *intentio* only sets forth these elements: "*Si paret hominem ex jure Quiritium Auli Agerii esse.*" There is no individual passive subject. In addition to the plaintiff there is only the thing which is the object of the right: in this case it is said that the *intentio*, or the formula, the action, is *in rem*.

277. The action is *in personam*, when a person appears in the *intentio* as the individual passive subject of the right. This is the case whenever the contention is that another is bound to give to us, to do for us, or to furnish us with something (*dare, facere, præstare, oportere*).

The action is *in rem*, when there being no individual passive subject of the right, the *intentio* merely contains the claimant and the thing which is the object of the right. This takes place whenever we maintain that a thing or a right independent of obligation belongs to ourselves (*aut corporalem rem intendimus nostram esse, aut jus aliquod nobis competere*).

The formula system has disappeared, but the division of actions into *in personam* and *in rem* has survived.

278. We thus see that mixed actions, that is, actions partly *in rem* and partly *in personam* could not exist under the formula system, and for their appearance we have to wait for a time when the true signification of these terms, as explained, has been lost; that is, to a period subsequent to the abandonment of the formula system.

279. Actions *in rem* bear the generic title of *vindicationes*, and actions *in personam* that of *actiones*, properly so called; or at other times that of *condictiones*, an expression, however, which in the beginning, and in a technical sense, was confined to a certain species of personal actions.¹



SECTION XCVII.—EXCEPTIO—REPLICATIO—DUPLICATION—
TRIPLICATION—PRÆSCRIPTIO.

280. These words express the accessory parts of the formula which bear the generic name of *adjectiones*.

Let us endeavour to realize the *exceptio*. It is possible that the action demanded by the plaintiff ought to be given to him, because, assuming the facts that he alleges, the action exists according to the principle of the civil law. It is possible these facts being found by the judge, the verdict according to strict law should be given in his favour; and yet that the defendant may be able to allege certain circumstances, which, if recognized as true, would render this verdict inequitable, for example, if he states that the promise that he made was obtained from him by surprise, by fraud, or by violence.² Under such circumstance, the prætors, in order to give to the judge the power of investigating these facts and of taking them into his consideration when pronouncing his judgment, announced them in the formula under the form of an *exceptio*, that is to say, in excepting or excluding that which had been stated in the *intentio*—in the case, for instance, where there was fraud, violence, or any similar allegation by the defendant. “*Si paret N. Negidium Aulo Agerio sestertium X. millia dare oportere*,” would be the form of the *intentio*, which would be followed by the *exceptio* thus: “*Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat* (if there has not been, and if there is not, any fraud on the part of Aulus Agerius) . . . *condemnato*, etc.” Sometimes, though more rarely, the *exceptio* was placed in the *condemnatio* in order to restrain it, as in the following example: “*Duntaxat in id quod favere potest condemnato*.” The *exceptio* is thus, speaking with etymological propriety, a restric-

¹ See upon this Gai. 4, § 1 et seq.

² Vide supra, No. 166.

tion, an exception placed by the prætor, either upon the claim set forth in the *intentio* or upon the *condemnatio*.¹

281. The magistrate on the one hand, therefore, adapted the *actio* to the case of the plaintiff, and on the other hand adapted the *exceptio* to that of the defendant, so that in fact the judge, by the formula, was instructed on the one hand to verify the case of the plaintiff, and on the other hand that of the defendant; it was, therefore, the magistrate who decided, whether the plaintiff on the one hand was entitled in law to his *actio*, and on the other hand the defendant to his *exceptio*, without in any way prejudging the merits of the case set up by either party. Thus the magistrate regulated the matter as a form of law, the judge ascertained and determined the facts.

If the *exceptio* was upheld it was a defence, and once and for ever determined the case in favour of the defendant.

282. The *replicatio* was no more than an *exceptio* raised on the part of the plaintiff to that of the defendant, and so on, the *duplicatio*, the *triplicatio*, &c.

283. The *exceptio* was, in the hands of the prætor, a powerful means of mitigating the rigour of the civil law. In fact this method of moulding the ancient institutions became a portion of written law; for we find laws, *senatûs-consulta*, and imperial *constitutiones*, upon the forms of the *exceptio*. It is, therefore, clear that the true Roman *exceptio* has nothing in common with that now understood by the term *exception*.

284. The *præscriptio* was an accessory part placed at the head of the formula; its object being analogous to that of the *exceptio*, it in the course of time altogether disappeared, the *exceptio* in all cases answering the purpose for which it was intended.

¹ Dig. 44, 1, 2, pr. f. Ulp.



SECTION XCVIII.—INTERDICTA.

285. The interdict was a decree, an edict delivered, at the request of an individual, by a magistrate imperatively ordering or prohibiting a given thing: “*Vim fieri veto.—Exhibeas.—Restituas.*” Such are the imperative words with which the interdict ordinarily terminated.

It was chiefly employed in connection with those matters more directly under the surveillance and protection of the public authority, in connection with religious matters, such as temples and tombs; or matters connected with common or public right, such as watercourses and highways.

It was also employed in connection with private rights (*rei familiaris causa*), in cases where matters were urgent,—as, for instance, where immediate intervention of authority was necessary to prevent a breach of the peace.

If the party against whom the interdict was pronounced submitted, the matter was at an end; if on the contrary, for any reason whatsoever he refused, the case then became a regular trial, the magistrate sending the parties either to a judge or to *recuperatores*.

286. The interdict in this procedure became the law of the case and of the parties. Thus we see the distinction between it and the *actio*: the interdict emanated from the magistrate as an act springing from his right to publish edicts; the *actio* on the other hand, as set forth in the formula, emanated from his judicial power. The one was an imperative command addressed to the parties, in order to prevent an *actio* should the interdicted submit, and to be the law determining the case should an action be commenced.

The interdict did not replace the action; on the contrary, it gave birth to it, and formed its basis, if, notwithstanding the fact of the interdict, there should be a suit.

Whenever the cause was regulated by law, or by general edicts constituting law for all, the prætor framed an *actio*. If the cause was such that it was deemed necessary to secure the intervention, at each step, of the imperative authority of the prætor, so that each might be governed by a special edict, which formed

the rule for that particular case, the prætor gave an *interdictum*. The interdict was thus a special edict, an edict between two parties: *inter duos edictum*.¹ *Inter dicere*, that is, in a certain sense, *inter duos edicere*. *Jus dicere*, *addicere*, *edicere*, *interdicere*, all these belong to the same family of words.

287. The interdict *de libero homine exhibendo*, which was a guarantee of individual liberty, ordered that whoever detained a free man should immediately produce him, "*Quem liberum de malo retines, exhibeas*."² This strongly resembles the English writ of *habeas corpus*.



SECTION XCIX.—EXTRA ORDINEM COGNITIO—EXTRAORDINARIA JUDICIA.

288. When the magistrate, instead of adopting the formula procedure, undertook himself to determine the case, this mode of procedure was termed *extra ordinem cognoscere*; *extra ordinem cognitio*; *extraordinaria judicia*; *actiones extraordinariæ*. The decision of the magistrate in this case was called a *decretum*.³

In certain matters this method was universally adopted, for instance, in the *restitutio in integrum*, by which the prætor relieved in an extraordinary manner citizens, on account of particular circumstances, from the consequences of a certain act or acts which had been prejudicial to them, and re-established them in the position in which they would have been had not these acts taken place; the other examples of this interference are the case of *missio in possessionem bonorum*;—or the placing in possession of goods, and the acts of the prætor *fideicommissarius*, who was a special prætor appointed for the consideration of disputes concerning *fideicommissa*.

289. Side by side with these trials by the formula system, whether those which took their origin in the formula, or those

¹ Gaius calls it the *Edictum prætoris*, 4, § 166.

¹ et seq.

² Dig. 43, 29, *De hom. lib. exhib.*, Julian, and 9 f. Callistr.

³ Dig. 1, 18, *De offic. præsid.*, 8

which were *extraordinaria*, we find vestiges of the *actiones legis* in cases where the matter was referred to the centumvirs, and in another special case, viz., the *actio damni infecti*, or threatened injury.



SECTION C.—THE DECLINE OF THE FORMULA SYSTEM.

290. The decline of this system commenced with the extensive adoption of the *cognitio extraordinaria*, and was completed under Diocletian. A constitution of this prince, dated A.D. 294, made that which had hitherto been extraordinary, the ordinary procedure throughout the provinces.¹ At a later date this was extended to the whole empire, and the formula system thus gave way to the *judicia extraordinaria*.



§ IV. JUDICIA EXTRAORDINARIA.

SECTION CI.—JUS AND JUDICIUM—THE OFFICE OF THE MAGISTRATE AND THAT OF THE JUDGE BECAME IDENTICAL.

291. The government at length became imperial (*imperium*, from *imperare*, military command). The old constitution of Rome at this period had ceased to exist. The aristocratic pride and exclusiveness of the ancient patrician order, and the restless ambition of the plebeian, had sunk to sleep, or lived only in the memory of the past. The class distinctions of early times were buried under the superincumbent mass of diverse populations compressed within the limits of the Empire.

From the time of Constantine, Rome and the Tiber had given place to Constantinople and the Bosphorus. The Empire was in fact no longer Roman, but Asiatic. It was divided into four great præfectures,—the East, Illyria, Italy, and the Gauls; each præfecture being divided into dioceses, each diocese into provinces; Italy was a præfecturate.

The entire hierarchy of civil or military authority emanated from the supreme head, from the sacred will. The magistrates

¹ Cod. 3, 3, *De pedan. judic.*, 2, const. Diocl.

were no longer functionaries of the republic, they were imperial officers.

Christianity was the state religion, and its clergy an official body.

This mighty revolution effected corresponding changes in the judicial power and the form of procedure.

292. The rector or president of each province; the vicarius or other delegates of the præfect; the prætorian præfect, a judge of appeal representing the emperor (*vice sacra*), and the ultimate appeal to the emperor himself, were the channel of justice. In minor matters the local magistrates of each city had a subordinate jurisdiction limited to a certain sum of money. Rome, Constantinople and Alexandria had each its distinct organization, and a fiscal jurisdiction entrusted by the emperor to special agents; military jurisdiction was distinctly separate from the civil, and the ecclesiastical jurisdiction of bishops was binding on the clergy, but voluntary as to other citizens.

293. All distinction between *jus* and *judicium* had ceased; the institution of the judge and the construction of the formula for each case had consequently disappeared.

The plaintiff denounced his adversary directly to the clerk or registrar of the competent authority (*apud acta denuntiari actionis denuntiatio*). The magistrate by his bailiff acquainted the defendant of the charge brought against him,¹ and in due course he himself tried the case.

294. The presidents of the provinces were, however, in the event of great press of business, authorized to remit cases of minor importance to the *judices pedanei*; "*hoc est*," said the Emperor Julian, "*qui negotia humiliora disceptant*."² These *judices pedanei* were inferior judges, with whose exact functions we are not well acquainted; they appear, however, to have been nominated by the Emperor, and a certain number of them to

¹ Cod. Theod. 2, 4, *De denuntiatione, vel editione rescripti*; especially 2 const. Constantin.; 4, 13, 1, § 1, const. Theod.; 15, 14, 9, const. Arcad. et

Honor.

² Cod. 3, 3, *De pedaneis judicibus* 2 const. Dioclet. et Maxim.; 5 const. Julian.

have been attached to each prætoriate; their jurisdiction was limited by Justinian to 300 solidi.¹

295. The exception had now become the rule, and all procedure was extraordinary.



SECTION CII.—THE CHANGE OF THE CHARACTER OF THE *Actio*, THE *Exceptio*, AND THE INTERDICT, UNDER THE EXTRAORDINARY PROCEDURE AND ESPECIALLY UNDER JUSTINIAN.

296. The *actio* was no longer either as under the *legis actiones* a fixed and symbolic procedure, nor as under the formula system the right conferred by the magistrate to enforce one's right before a judge, nor the formula conferring and regulating this right; it was simply the right resulting from legislation itself to address one's self to the competent judicial authority in order to obtain justice, or it was the act itself of obtaining justice.

The *exceptio* had no longer any technical signification; it was no longer a restriction, an exception placed by the magistrate on the power conferred upon the judge of passing sentence. But it was a means of defence which could be employed by the defendant at the hearing of the case; it had, in fact, totally changed its effect; it did not necessarily import the defendant's complete success; it might only act by way of delay, and the same might be said concerning the *replicatio*, the *duplicatio*, and the *triplicatio*, which were merely reciprocal means of defence.

Interdicts no longer existed in those cases where they were granted by the prætor, as there was now a direct action before the competent judicial authority.

The various names remained in use indeed, but were no longer consonant with the institutions which had radically changed.

¹ Novell. 82, c. 5.

SECTION CIII.—THE VARIOUS SIGNIFICATIONS OF THE WORD ACTIO.

297. From all that has been said it is clear that it would be a great error to limit the word *actio* to any one meaning, seeing that it has changed its signification with each change of the mode of procedure.

Under the system of *legis actiones* it signified a fixed and symbolic form of procedure not specifically applied to each class of right.

Under the formula system a right granted by the magistrate in each individual case to prosecute before the judge, or else the formula itself, or else the trial itself which was organized by the formula. *Actio, formula, judicium*, are here synonymous. Each right, however slight the difference, had its distinctive formula, its *actio* provided beforehand, drawn up in a general manner and settled by legal science, and which was publicly exhibited. Each cause had its own formula, its *actio* specially drawn up and reduced to writing after discussion. The great importance of correctly discriminating between these several phases which the word underwent, in the study of Roman law cannot be overrated.

Under the extraordinary procedure the *actio* was nothing more than the right which every person derived directly from the law to enforce his claim before the competent judicial authority; or if we take the word in its natural and etymological acceptation, it was the act itself of enforcing this claim, or the means of enforcing it.

The word, even under the formula system, in its wide signification, included every claim and every defence given by the law, whether actions properly so called, exceptions, interdicts or *restitutiones in integro*.¹ It is in this general sense that the jurists used the term when they adopted the classification of jurisprudence, of law as applied to persons, things and actions.

And, finally, the word *actio* may be applied to the conduct

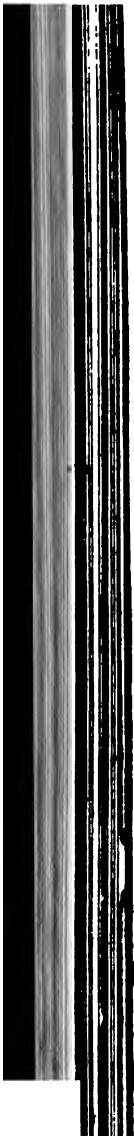
¹ Dig. 44, 1, 1; 44, 7, 37 and 51; Paul., *Sent.*, 1, 7, § 1.

itself of the case, the arguments of the advocates at the hearing.¹

CONCLUSION.

298. When the student has acquired correct general notions of law as the science of the good and the equitable, as the rule of human action and of legislation, as the result or immediate consequence of the science,—when he has familiarized himself with the elements, persons whether active or passive subjects, things the objects of right, facts, &c., and can accurately distinguish the various species of rights and the modes of enforcing them,—he will then, and not till then, be in a position to pass to the intelligent study of the details of legislation and jurisprudence.

¹ Cic., *Pro Flacco*, 20; *Pro Tull.*, 6; *Pro Cæcio*, 2, 3, 33.



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